



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

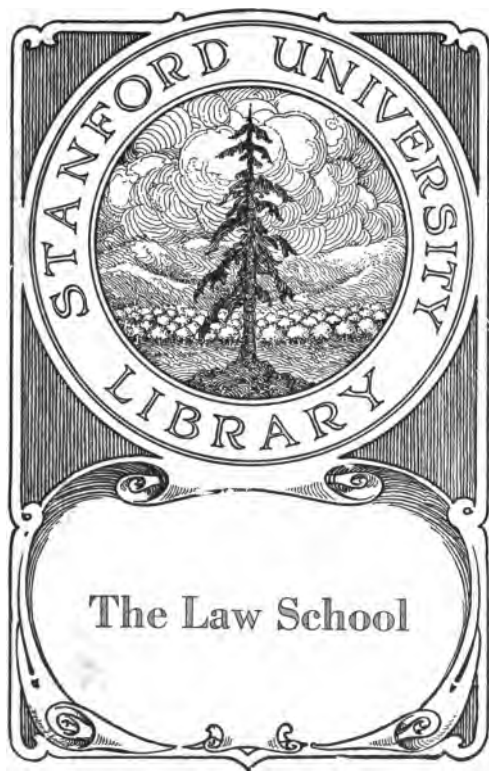
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

NEGLIGENCE



AMERICAN SCHOOL OF CORRESPONDENCE
CHICAGO ILLINOIS



EID
AAN
KAWU

NEGLIGENCE

INSTRUCTION PAPER

PREPARED BY

ARTHUR MARTIN CATHCART, A.B.

PROFESSOR OF LAW, LELAND STANFORD JR. UNIVERSITY

AMERICAN SCHOOL OF CORRESPONDENCE

CHICAGO

ILLINOIS

U.S.A.

STANFORD LIBRARY

L13744

JAN 24 1938

**COPYRIGHT 1912 BY
AMERICAN SCHOOL OF CORRESPONDENCE**

**Entered at Stationers' Hall, London
All Rights Reserved**

VSABU 0807142

CONTENTS

CHAPTER I

Nature of Negligence

Negligence as a Basis of Responsibility

	PAGE
§ 1. Legal responsibility for harm.....	1
§ 2. No liability for mere nonfeasance.....	2
§ 3. Responsibility for acts.....	3
§ 4. Negligence a basis of responsibility—essential to liability for unintended harm.....	6
§ 5. Modern exceptions to rule that negligence is essential to liability for unintended harm.....	7

Elements of Actionable Negligence

§ 6. Actionable negligence defined—essentials of a cause of action for negligence.....	10
§ 7. What is meant by the expression "duty of care".....	11
§ 8. When does a duty of care exist.....	11
§ 9. Duty of care must be owed by defendant to plaintiff.....	13
§ 10. What constitutes breach of duty of care—concrete forms of negligence.....	14
§ 11. What constitutes actual damage in an action for negligence.....	16
§ 12. Actionable negligence and breach of contract.....	20

CHAPTER II

Standard of Care

In General

§ 13. Necessity of an external standard.....	22
§ 14. Care required of normal adults—ordinary care defined.....	23
§ 15. Care required of insane persons.....	24
§ 16. Care required of children.....	25

Degrees of Care and Negligence

§ 17. Are there degrees of care and negligence.....	27
§ 18. Ordinary care not always an adequate measure of duty—degrees of care and negligence must be recognized in certain relations.....	28
§ 19. Ordinary care the true measure of duty in most cases.....	29
§ 20. Degrees of negligence as indicating extent of failure to use due care..	32

Duty of Care on Part of Maker or Vendor of Chattel Toward Users Other Than Immediate Vendees

§ 21. General rule—no duty owed.....	35
--------------------------------------	----

CONTENTS

<i>Duty of Care on Part of Owner or Occupier of Land</i>		PAGE
§ 22.	Duty dependent upon special considerations.....	39
§ 23.	Condition of premises.....	40
§ 24.	Active conduct.....	43
§ 25.	Duty of care toward licensees in general.....	46
§ 26.	Condition of premises.....	47
§ 27.	Active conduct.....	48
§ 28.	Duty of care toward persons invited on business.....	49
§ 29.	Duty of care toward social guest.....	50
§ 30.	Duty of care toward users of adjacent public way.....	50

CHAPTER III

Legal Cause

§ 31.	Relation of legal cause to negligence in general.....	53
§ 32.	Defendant's negligence proximate cause of plaintiff's damage.....	53
§ 33.	Defendant not liable for remote consequences.....	55
§ 34.	Proximate cause a mixed question of law and fact.....	56

Rules for Determining Legal Cause

§ 35.	Ordinarily defendant's negligence must have contributed essential element to production of plaintiff's damage.....	58
§ 36.	Usual test—The "natural and probable consequence" rule.....	61

Intervening Causes

§ 37.	In general.....	66
§ 38.	Inanimate forces.....	67
§ 39.	Actions of animals.....	68
§ 40.	Acts of the plaintiff.....	70
§ 41.	Acts of third persons.....	71

CHAPTER IV

Contributory Negligence

§ 42.	Nature of contributory negligence.....	78
§ 43.	Effect at common law.....	79
§ 44.	Effect in admiralty.....	80
§ 45.	Effect under modern statutes.....	81
§ 46.	Legal cause of injury.....	81
§ 47.	When defendant's negligence precedes plaintiff's.....	82
§ 48.	When defendant's negligence is concurrent with plaintiff's.....	83
§ 49.	When plaintiff's negligence precedes defendant's.....	84
§ 50.	Negligence by representation.....	86
§ 51.	Parent and child.....	87
§ 52.	Other instances.....	88

NEGLIGENCE

CHAPTER I

NATURE OF NEGLIGENCE

NEGLIGENCE AS A BASIS OF RESPONSIBILITY

§ 1. **Legal Responsibility for Harm.** The kinds of harm that are known to human experience are infinitely varied: they range from loss of property to loss of friends; from physical pain to mental suffering; from that which is gross and tangible to that which is refined and spiritual. Suppose that a man has suffered harm of some sort and that he contemplates bringing an action against his neighbor to recover damages for that harm: upon what will his right to maintain such an action depend? Obviously he must be able to show that the occurrence of the harm of which he complains was a breach of the neighbor's legal duty toward him. If there existed a valid contract between the two whereby the neighbor had agreed to protect him from such harm, it is plain that the neighbor is liable for breach of contract. But suppose that no contract was in existence: it is plain that we must find a breach of duty that is quite independent of contract; that is to say, it must appear that the neighbor has committed a tort. Upon what does responsibility for harm in the law of tort depend? Generally speaking, it depends upon the nature of the particular harm and the circumstances under which it was inflicted. Assuming that the harm itself is not of a sort too vague or intangible for the law to notice, the defendant's liability must depend upon his relation to the harm which the plaintiff has suffered. Directing our attention to this relation, we discover an obvious limitation. If the defendant neither caused nor could have prevented the

harm of which the plaintiff complains; if, for example, the particular loss or damage was the necessary result of the plaintiff's own independent act, or of the action of a third person over whom the defendant had no control, or of the operation of a blind natural force, like flood or earthquake, over which nobody has any control; then we say at once that it would be absurd to hold the defendant liable. Common sense teaches us that, in the absence of contract, a man could not fairly be held responsible for the occurrence of any event which he neither caused nor could have prevented.

§ 2. No Liability for Mere Nonfeasance. But common sense will not enable us to detect all the limitations to defendant's liability. *A* deliberately sets fire to *B*'s house. As a natural consequence the house burns down. Is *A* liable? Common sense tells us that he is and the law so regards him; he has culpably caused a great loss to *B*. Suppose, however, that just after *A* has kindled the fire and while the struggling flame may easily be extinguished with a pail of water, *C* comes along and discovers what *A* has done. Water in abundance is at hand; *C* is able-bodied and it is the work of a moment to put out the fire; or, if he does not choose to put out the fire himself, he may shout an alarm and bring neighbors who will be glad indeed to render so slight a service to *B*; but *C* neither puts out the fire nor gives the alarm and the house burns down. Here common sense, unaided by legal knowledge, might lead us astray upon the question of *C*'s liability to *B*. He could have prevented great loss to *B* by making slight exertion; he did no act at all and *B* suffers. *C*'s moral delinquency is perfectly clear; if the law treated him as legally at fault, common sense would doubtless approve such treatment; and yet nothing in law is more certain than that *C* is not liable to *B* on these facts. It will be noted that *C* had nothing to do with starting the fire; no act of his aided in the destruction of *B*'s house; he simply failed to do an act that would have prevented its destruction. That failure was morally culpable, but it will not make him legally liable. If a man

will act he must take care to act in such a way as to avoid harming others; but the common law does not cast upon him the duty of initiating action so as to prevent the occurrence of harm to others. Indeed it is a general rule that, in the absence of contract or other undertaking treated by the law as contractual, there is no legal duty to act affirmatively. It necessarily follows that a man is not liable for mere inaction or nonfeasance.¹

§ 3. Responsibility for Acts. Suppose, however, that defendant's relation to plaintiff's harm consists not in a mere failure to prevent it by means of a positive act, but that some act of the defendant's appears as a link in the chain of causation that has produced the plaintiff's injury. Now it appears that the defendant's act has helped bring about the harm of which the plaintiff complains. In a physical sense that harm is in part, at least, a consequence of defendant's action. Will that alone make the defendant liable? The law answers "No." Upon what, then, does liability for such a consequence depend?

One of the ablest of modern law writers has shown that at common law civil liability for harm depends, in the absence of contract, upon three considerations: (1) The character of the harm done and the extent to which the law is willing to go in protecting an individual from such harm; (2) the existence of a responsible causal relation between the defendant's act and the plaintiff's harm; (3) the absence of a legal excuse for defendant's act, as, for example, self-defense or official duty.² The character of the harm done we shall have occasion to consider later; the subject of legal excuse is more appropriately treated under the head of torts; we are here concerned with but one of these considerations, viz, the existence of a responsible causal relation between the defendant's act and the plaintiff's harm. Waiving, for the present, all question as to the character of the harm inflicted and as to the pos-

¹ Union Pacific R. R. v. Cappier, 66 Kas. 649.

² Wigmore, J. H., *The Tripartite Division of Torts*, 8 Harvard Law Review 200-210.

sible existence of an excuse for its infliction, and assuming those considerations to be favorable to the plaintiff's recovery in a given case; how shall we determine whether or not this responsible causal relation is present? That question cannot be fully answered without an examination of the doctrines of Legal Cause; but, assuming for the present that those doctrines are favorable to the plaintiff's recovery in the particular case, we can say that the defendant's responsibility, and, therefore, his liability under the assumptions made, depends, as a rule, upon his moral culpability with respect to the plaintiff's harm.

Importance of Defendant's Mental Attitude Toward the Consequences of His Acts. Whether or not we may fairly blame a man for the consequences of his act depends ordinarily upon his mental attitude at the time the act was done. And the law recognizes this test of culpability. To illustrate: *A* throws a stone: the stone strikes *B* and injures him. Is *A* legally responsible for *B*'s injury? Clearly the harm has been caused by *A*'s act, but, as we have seen, that is not enough. Suppose that *A* intended to hit *B* with the stone at the time he threw it: *A*'s moral responsibility in such a case is self-evident and none would question his legal responsibility—he is guilty of an intentional tort. Or, suppose that *A* did not intend to hit *B*, but that, as a man of ordinary prudence, he ought to have foreseen that his throwing the stone would endanger *B*'s safety: here *A*'s culpability is not so great, but his moral responsibility is nevertheless clear—we instinctively blame him for his carelessness; and his legal responsibility is equally clear—he is guilty of a negligent tort. But suppose that *A* not only did not intend to hit *B*, but that, as a prudent man, he had no reason to anticipate that his throwing the stone would endanger *B* or anyone else; suppose, for instance, that he reasonably thought himself quite alone in the vicinity: here all men would agree that *A* is free from moral blame; and, if legal responsibility depends upon moral culpability to the extent we have heretofore stated, it follows that *A* is not liable. This conclusion is according to the modern,

view, but, as will presently appear, such has not always been the law.

Ancient and Modern Doctrines Contrasted. Under the early common law a man acted at his peril. Culpability seems to have been quite immaterial upon the question of civil liability.³ Under that law it would have been enough that *A* had voluntarily given the impetus to the stone that struck *B*, although no reasonable man could have foreseen that the stone would strike anyone. The courts looked not to the delinquency of the defendant but to the damage sustained by the plaintiff. Said Justice Littleton in an early case, "If a man is damaged he ought to be recompensed."⁴ And the common law clung to that doctrine with the greatest tenacity. The doctrine of absolute liability for the direct consequences of forcible acts was not abandoned in England until the decision of *Stanley v. Powell*,⁵ in 1891, although it had previously been rejected in America. *Brown v. Kendall*,⁶ the leading American case upon the question, clearly states the modern doctrine which makes culpability the basis of tort liability. A statement of that case will introduce us to negligence as a ground of legal responsibility. The facts were few and simple.

Two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters. The defendant took a long stick and commenced beating the dogs in order to separate them. In raising the stick over his shoulder he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury. Plaintiff sued defendant in an action of trespass. In deciding what, plaintiff must prove in order to maintain his action, the court said:

"We think, as a result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention was unlawful* or that the defendant was *in fault*; for

³ Wigmore, Responsibility for Tortious Acts, 7 Harv. Law Rev., 315-323.

⁴ Anonymous, Y. B., (6 ed.) IV, f. 7, pl. 18. (1466).

⁵ 1 Q. B. (1891) 86.

⁶ 6 Cush. (Mass.) 292.

if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable..... If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in the eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable and, therefore, the action would not lie..... If it appears that the defendant was doing a lawful act and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence or want of prudence, the plaintiff fails to sustain the burden of proof and is not entitled to recover."

§ 4. Negligence a Basis of Responsibility—Essential to Liability for Unintended Harm. It will be noted that the word "negligence", as used by the court in *Brown v. Kendall*, means simply carelessness, a failure to act with such care as ordinary prudence demands. A similar meaning was assigned to it in the leading case of *Blyth v. Birmingham Waterworks Co.*⁷ In that case it appeared that a fire plug in one of the defendant's mains had failed to act properly, in consequence of which water escaped from the main and found its way into the plaintiff's house, thereby damaging his property. The immediate cause of the difficulty with the fire plug was an incrustation of ice which had gathered about it. This ice had formed during a long period of cold weather of extraordinary severity. For the ice of twenty-five previous winters the fire plug had proved adequate. The court held that there was no evidence of negligence in the case, since it appeared that the defendant had provided against such frosts as experience would have led men, acting prudently, to provide against. "Negligence," said Alderson, B., "is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." So considered, negligence is

⁷ 11 Exchequer 781.

in substance a ground of legal responsibility; it is essential to liability for unintended harm. Strictly speaking, negligence is not a tort in itself; it is rather an element of culpability that makes an otherwise lawful act wrongful. Logically there is no reason why liability for negligence should be restricted to any particular kind of harm or mode of inflicting harm. Thus, it would seem that one might be liable for the harmful consequences of false representations negligently made; but it so happens that the law has always dealt with false representations under the head of "deceit" and deceit has usually been regarded as an intentional tort.⁸ So, too, it would seem that negligence might be important in determining whether a particular defendant might be held responsible for the publication of a libel; but negligence in that connection, although its importance has not been overlooked,⁹ is dealt with by the law of torts under the head of "libel". Actions for negligence are generally actions to recover damages for harm resulting from physical interference with the plaintiff's person or property.¹⁰ If such harm has resulted from a direct application of force to the plaintiff's person or property by the defendant, the presence of negligence supplies that element of responsibility which completes the tort of trespass and the plaintiff may choose between the appropriate action for that tort and the action on the case for negligence;¹¹ but when such harm has resulted indirectly from the defendant's act, the completed tort has no specific name apart from actionable negligence. From this association of negligence with injuries to person or property has resulted a tendency to regard negligence as a tort in itself rather than as an element of a tort. But negligence in itself is not a tort; it is simply a basis of legal responsibility.¹²

§ 5. Modern Exceptions to Rule that Negligence Is Essential to Liability for Unintended Harm. While it is

⁸ *Derry v. Peek*, 14 Appeal Cases 337.

⁹ *Emmens v. Pottle*, 16 Q. B. D. 354.

¹⁰ 1 Street, *Foundations of Legal Liability*, 71.

¹¹ *Dalton v. Favour*, 3 N. H. 465.

¹² *Wigmore, J. H., Tripartite Division of Torts*, 8 Harv. Law Rev. 200, 206.

true that the ancient doctrine of absolute liability has been generally rejected for the modern doctrine that culpability is essential to liability for unintended harm it must not be supposed that the law has been uniformly consistent in its abandonment of the older view. As a matter of fact a man still acts at his peril in certain exceptional cases. If he enters another's land,¹³ or takes another's chattel,¹⁴ under an innocent mistake as to title he will be liable although he took every possible precaution to ascertain the true title. If he keeps live stock he must restrain them at all events and cannot excuse their entry upon another's premises by showing that he was guilty of no negligence in suffering them to escape.¹⁵ So, too, if he has notice of any mischievous propensity in any of his domestic animals he is bound at his peril to see that nobody is harmed in consequence of such propensity.¹⁶ And, if he undertakes to maintain a wild animal in captivity, such as a tiger, an elephant,¹⁷ or even a monkey,¹⁸ he will be absolutely liable for the harm that it may do. Similarly, if he maintains a powder magazine in a populous community or keeps any other explosive in an improper place he is bound to see that it is safely kept; if an explosion occurs and damage is done he cannot excuse himself by showing that he did all he could to prevent an explosion in the place where the explosive was kept.¹⁹ On the other hand, if he selects what is, under the circumstances, a proper place for storing explosives he will be liable only in case negligence is shown.²⁰ As to most of these exceptions it may be said generally that they have to do with the strict observance of property rights or with an undertaking that is in its nature hazardous.

Rylands v. Fletcher. In the celebrated English case of

¹³ *Higginson v. York*, 5 Mass. 341.

¹⁴ *Hobart v. Hagget*, 3 Fairfield 67.

¹⁵ *Tonawanda R. R. v. Munger*, 5 Denio, 267.

¹⁶ *Crowley v. Groonell*, 73 Vermont 45.

¹⁷ *Filburn v. People's Palace and Aquarium Co.*, L. R. 25 Q. B. D. 258.

¹⁸ *May v. Burdett*, 9 Q. B. 101.

¹⁹ *Heeg v. Licht*, 80 N. Y. 579.

²⁰ *Dilworth's Appeal*, 91 Pa. St. 247.

Rylands v. Fletcher,²¹ some of the exceptions just considered were made the basis of a wide generalization which requires special notice. The plaintiff claimed damages for loss sustained from the flooding of his coal mines by water that escaped from the defendant's reservoir. The defendant had built the reservoir to secure a supply of water for his mill. The water escaped into the plaintiff's mines through some abandoned shafts that had become filled with rubbish. The House of Lords assumed that the defendant was free from negligence, but held that he was liable for the damage caused by the escape of the water. Said Lord Cranworth:

"If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

Lord Cairns laid stress upon the fact that the defendant's use of his land was not an ordinary or natural one. Whatever may have been the true basis of the decision it is generally regarded as settling the law for England so far as damage by the escape of impounded water is concerned. But the tendency there has been to narrow, rather than extend, the application of the rule. Thus, it is held that if the water escape by reason of the act of God, as in the case of an extraordinary freshet,²² or by reason of the culpable act of a third person,²³ the defendant is not liable. The doctrine of the case has met with much opposition in this country,²⁴ although it has been accepted in a few jurisdictions.²⁵ It is certainly counter to the general trend of the law and seems to be the result of an overwide generalization drawn from exceptional cases.

²¹ Law Reports, 3 H. of L. 330.

²² *Nichols v. Marsland*, Law Rep., 2 Exchequer Div. 1.

²³ *Box v. Judd*, Law Rep., 4 Exchequer Div. 76.

²⁴ *Brown v. Collins*, 53 N. H. 442.

²⁵ *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296.

ELEMENTS OF ACTIONABLE NEGLIGENCE

§ 6. Actionable Negligence Defined—Essentials of a Cause of Action for Negligence. We have seen that negligence in itself is not a tort; that it is rather a basis of responsibility for the consequences of acts. We have also seen that there is no logical necessity for restricting the legal signification of negligence to any particular kind of harm or mode of inflicting harm, but that, as a matter of fact, the ordinary action for negligence is usually an action to recover damages for a negligent injury to person or property. The frequent occurrence of such actions has resulted in the development of a body of rules which we may designate as the law of negligence. For practical convenience we may say that these rules treat actionable negligence as a tort in itself. When we remember that actionable negligence is not mere negligence, but negligence plus resulting damage, such a conception does not seem inaccurate. Actionable negligence, as a subject for special study, may be regarded as a tort, the gist of which is the negligent infliction of damage upon a man's person or property.

What are the elements of such a tort? A comprehensive answer is found in the oft-quoted definition of Brett, M. R., in the leading case of *Heaven v. Pender*:²⁶

“Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care or skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.”

This definition discloses at least four elements: (1) it must appear that the defendant owed the plaintiff the duty of ordinary care; (2) it must also appear that the defendant neglected to use such care; (3) injury or damage to plaintiff's person or property must have been caused by defendant's failure to use care; (4) plaintiff's own negligence

²⁶ L. R. 11 Q. B. D. 503.

must not have been a contributing cause of the injury or damage of which he complains.

§ 7. What Is Meant by the Expression "Duty of Care"? The expression "duty of care", so frequently used in discussions of negligence, requires close examination. It is frequently said that every violation of a man's right gives him a cause of action against the one who violates his right.²⁷ It is also frequently said that the opposite of legal right is legal duty; that when one has a right against another, that other owes him a corresponding duty; that every violation of a right is a breach of a corresponding duty; that every breach of duty is a violation of a corresponding right.²⁸ From this it would logically follow that every breach of legal duty is actionable. Using the word duty in that strict sense, we must conclude that the expression "duty of care" is a very loose one, for in no case will a mere failure to exercise care be actionable. There is no true violation of the plaintiff's right, no complete breach of the defendant's duty toward the plaintiff, which the law will attest as such by giving the plaintiff a cause of action, until damage actually results from the defendant's failure to exercise care.²⁹ What then is meant when it is said, that the defendant will not be liable for negligence unless he owed the plaintiff a duty of care? It is conceived that what is really meant is this: there must exist such a relation between plaintiff and defendant that, if defendant act without observing care toward plaintiff, and damage to plaintiff follows as a consequence, defendant will be liable.

§ 8. When Does a Duty of Care Exist? When does that relation exist in which it is incumbent upon a man to have a care toward his neighbor's safety upon pain of being liable to him in an action for damages in case damage actually results from such failure? From what has been previously said it is apparent that such a relation can exist only when the defendant is acting. Since he is not liable

²⁷ *Webb v. Portland Mfg. Co.*, 3 Sumn. 189.

²⁸ *Bigelow on Torts* (8th ed.) 38.

²⁹ *Sullivan v. Old Colony St. Ry.*, 200 Mass. 303.

for mere nonfeasance he cannot be liable for harm that he has simply failed to prevent by taking care to do affirmative acts. In other words, the duty of care can apply only to governing the defendant's active conduct. Assuming, then, that a man is acting, when is he under a duty to exercise care toward another? *A* is plowing a field in Illinois. *B* is climbing a mountain in Colorado. Is *A* under a duty of care toward *B*? Obviously not. *A* could not hurt *B* if he tried. *M* is driving a team of horses in a public highway. *X* is driving another team in the opposite direction on the same highway. The two teams are about to meet. Does *M* owe a duty of care toward *X*? Obviously he does, just as *X* owes a duty of care to *M*. The danger of a collision calls for an effort to avoid it. Thus, duty of care seems to depend upon the probability of harm in case care is not exercised.

In the great case of *Heaven v. Pender*,³⁰ Brett, M. R., thus undertakes to formulate the underlying principle:

"Whenever one person is, by circumstances, placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

This statement has been criticized as too sweeping; it is certainly not of universal application. As worded it would impose liability upon a defendant for the consequences of acts done under what the law regards as a legal excuse, for instance, acts done in the lawful use of one's own land or in lawful business competition, provided only that resulting damage to another be foreseeable. Nevertheless, the test proposed by the Master of the Rolls is a very useful one; it is certainly the test which all men naturally apply in deciding in their own minds whether or not a particular situation calls for the exercise of care as a moral duty. Barring those cases in which the law recognizes a legal excuse for

³⁰ L. R. 11 Q. B. D. 503.

harm done, it is believed that this test as applied to the legal duty of care is substantially correct. What constitutes "ordinary care and skill" will be considered later.

§ 9. Duty of Care Must Be Owed by Defendant to Plaintiff. In the first section of this chapter we saw that negligence supplies that element of culpability which the law regards as essential to liability for unintended harm. When we consider that the requirement of such an element is a modern innovation supplanting the ancient doctrine of absolute liability, we might naturally suppose that whenever that element enters into any act legal responsibility ought to attach to the consequences of that act. To illustrate: *A* throws a stone; at the time he throws it he ought to foresee that it is likely to strike and injure *B*, but he has no reason to suppose that it may hit *C*; however, the stone does strike *C* and injures him. Of course the ancient law would have held *A* liable to *C* on the principle of absolute liability. The modern law requires a culpable act; but *A*'s act was culpable, for it was negligent with respect to *B*. *A*, then, has done a culpable act and that act has injured *C*. Does this not satisfy the requirements of the modern doctrine? If the law looked to the culpability of the defendant as the sole test of responsibility for harm done, *A*'s liability to *C* would be clear; but the law allows an action to the plaintiff only in case his legal right has been violated by the defendant; or, stated conversely, in terms of duty, only in case the defendant has violated a legal duty owed by him to the plaintiff.

Undoubtedly, the modern law might have recognized a right in every man not to be injured by the culpable act of any man; or, conversely, the law might have imposed upon every man a duty not to injure any man by a culpable act. Had the law taken that course, *A* would clearly have been liable to *C* in the case supposed. But the law seems to have taken a distinction upon the basis of degrees of delinquency. Had *A* intended to hit *B* when he threw the stone but accidentally struck *C* instead, *A* would have been civilly liable to *C* in an action for assault and battery; the law would have

seen a violation of the plaintiff's right and a breach of the defendant's duty.³¹ But where the defendant's fault consists in negligence only, the law takes a more favorable attitude toward him. Its recession from the doctrine of absolute liability did not stop with the requirement that, in the absence of evil intent, the defendant's act must be shown to have been negligent; it took the ground that his act must have been negligent toward the plaintiff himself. In other words, stating the matter in terms of right and duty, when negligence is relied upon as a basis of liability, the law recognizes a violation of the plaintiff's right and a breach of the defendant's duty only where the circumstances created a duty of care toward the plaintiff himself and the defendant has failed to exercise that care. Hence, it follows that in the case first supposed *A* would not be liable to *C*, although he would have been liable to *B* had the stone struck him. Said Mr. Justice Mitchell in *Akers v. Railroad*:³²

“Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty there is no negligence. Even if a defendant owes a duty to someone else, but does not owe it to the person injured, no action will lie.”

§ 10. What Constitutes Breach of Duty of Care—Concrete Forms of Negligence. Thus, it appears that in the eye of the law one person is negligent toward another when he fails to observe a duty of care owed by him toward that other. For practical purposes it becomes important to consider the concrete forms in which negligence or such breach of duty may appear. Generally speaking, we may say that it appears either as an act or as an omission.

In the leading case of *Blyth v. Birmingham Waterworks Co.*,³³ Baron Alderson said:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which

³¹ *James v. Campbell*, 5 C. & P. 372. ³³ 11 Exchequer 781.

³² 58 Minn. 540.

ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

But is this not an abandonment of our reiterated assertion that there is no liability for mere inaction or nonfeasance? What is an omission but inaction? Such an argument was made in an actual case.⁸⁴ The action was brought to recover damages for personal injuries sustained by the plaintiff while a passenger on the defendants’ railway. It was admitted by the defendants that the accident occurred as a result of the carelessness of the engineer in not turning off steam in time to prevent the train from running into the dead end at the station; but it was contended that this omission to turn off steam was a mere nonfeasance and that, therefore, the defendant was not liable in tort. The court, however, did not adopt the defendants’ view. Said Smith, L. J.:

“The distinction between acts of commission or misfeasance, and acts of omission or nonfeasance, does not depend on whether a driver or signalman of a defendant company has negligently turned on steam, or negligently hoisted a signal, or whether he has negligently omitted to do the one or the other”.

Lord Justice Rigby said:

“It appears to me that the attempt to dissect the act of the defendants’ servant, and to treat the mere omission to turn off steam as a nonfeasance within the meaning of the cases referred to, altogether fails. An engineer is in charge of the train, and a passenger is in that train, independently of contract, with the permission of the defendants. The passenger is injured in consequence of the train being negligently brought into collision with the dead end. The proper description of what was done is that it was a negligent act in so managing the train as to allow it to come into contact with the dead end and so cause the accident. It is a case in which the company by their servant neglected a duty which they owed to the plaintiff—that is to say, it was a case in which an action of tort could be brought.”

⁸⁴ Kelly v. Metropolitan R. R. Co., 1 Q. B. (1895) 944.

It is indeed true that one is not liable for a mere omission; and yet, paradoxical as it may seem, Baron Alderson is right in saying that negligence may consist of an omission. A man is not bound to initiate action; but, if he once begins to act, he must take care to avoid injuring others, and taking care may often involve doing particular acts, the omission to do which will render his whole conduct negligent. A train may be run negligently by failing to shut off steam at one time as well as by turning on steam at another. A horse may be driven negligently by failing to pull a rein which ought to be pulled as well as by pulling a rein which ought not to be pulled. A surgeon may negligently perform a surgical operation by omitting to sew up a necessary wound as well as by making an unnecessary wound.

§ 11. What Constitutes Actual Damage in an Action for Negligence. Assuming that the defendant has been guilty of an act or omission that constitutes a breach of duty of care owed by him to the plaintiff, using the word "duty" in the loose sense heretofore explained, we have now to inquire what sort of damage is necessary to the completion of a breach of duty in the more technical sense of the word. In other words, our problem now is to determine what constitutes such damage as will complete an action for negligence. We have already seen that the ordinary action for negligence seeks to recover damages for physical harm to person or property. If the harm complained of has been sustained with reference to property no real difficulty is presented. We may say generally that any loss or damage of such a nature as appreciably to diminish the value of the property affected is sufficient. Thus, if *A* negligently breaks *B*'s watch into fragments, *B*'s right of recovery is obvious; but his cause of action is no more certain or complete than it would have been had *A* merely broken the mainspring or the crystal. So if *A* negligently burns *B*'s office building the latter's right of action is self-evident; but legally the case is no clearer than it would have been had the fire destroyed his woodshed instead. When, however, we come to deal with damage to the person, the problem is often one

of real difficulty. So long as the law can see actual physical injury it regards the plaintiff's case as complete. In many cases, of course, such injury may be as clearly established as may damage to property. Nobody doubts that a broken bone, or a sprained ankle, or a deep flesh wound, is an actual damage; but the law appears to regard an ordinary bruise or a slight flesh wound as equally sufficient to complete the plaintiff's right to recovery.³⁵ It has even been held that a more or less violent impact, such as is involved in being thrown out of a wagon or in being compelled to jump out, is likewise sufficient, although the actual harm to the plaintiff consists mainly of nervous shock.³⁶ On the other hand, it is well established that in the absence of such impact, mere fright or mental suffering, however distressing in itself, is not such damage as to complete a cause of action for a negligent personal injury.³⁷ Where is the line to be drawn?

Nervous Shock and Resulting Illness in Personal Injury Cases. The unwillingness of the courts to hold that it is actionable to frighten another negligently is intelligible enough. It does not rest upon the idea that fear is never a real and substantial harm; it seems rather to rest upon the belief that such a holding would, owing to the difficulty of determining either the existence or the extent of an emotional mental state, result in injustice to the defendant in many cases.³⁸ Were the law to declare that one who negligently puts another in fear shall be liable to that other in an action for damages, it would thereby encourage litigation and open a wide door to fraud and perjury. Honest plaintiffs might regard any feeling of fear, however transient and inconsequential, as coming within the rule, and sue accordingly. And if they sued, how could the line be drawn so as to exclude recovery? Dishonest plaintiffs would be tempted to swear falsely, having much to gain and little to

³⁵ *Canning v. Williamstown*, 1 Cush. 451.

³⁶ *Warren v. Boston & Maine Railroad*, 163 Mass. 484.

³⁷ *Shearman & Redfield on Negligence* (5th ed.) § 761.

³⁸ As to recovery for fear or mental suffering intentionally caused, see *Article on Torts*.

fear—it would be difficult indeed to convict a man of perjury who had falsely sworn that he had experienced a certain emotion on a particular occasion.

By requiring proof of a tangible physical injury as a condition precedent to recovery, the law doubtless prevents recovery in many cases in which abstract justice would seem to favor the plaintiffs, but by such a policy it doubtless discourages litigation in the case of plaintiffs with no substantial grievance while leaving the door open to the vast majority of those who have actually suffered substantial personal harm at the hands of negligent defendants. But it often happens that sudden terror or nervous shock causes severe illness, illness that may be clearly proved without reliance upon the mere statement of the sufferer. In such a case we have apparently all the elements of a good cause of action: the defendant has been negligent toward the plaintiff; the plaintiff has experienced great fear or nervous shock as a result of such negligence; this shock has caused a palpable physical injury; so that the defendant's negligence has really caused substantial physical injury to the plaintiff.³⁹

Does the fact that there was no impact in such a case prevent recovery? Most courts have answered the question in the affirmative. Others allow recovery in such a case.

Conflicting Decisions. The view of the majority is well illustrated by *Spade v. Lynn & Boston R. Co.*⁴⁰ The facts were briefly these: plaintiff was a passenger on defendant's train; one of defendant's servants, in attempting to remove a disorderly person from the car in which plaintiff was riding, negligently created a disturbance which frightened the plaintiff and subjected her to a severe nervous shock; as a result of this shock the plaintiff became physically ill. Held, that the plaintiff could not recover. The court conceded that the defendant's negligence might in a physical

³⁹ The plaintiff may recover for fear, nervous shock, and mental suffering as items of damages when he has once established a completed tort. See Article on Damages.

⁴⁰ 168 Mass. 285.

sense be the actual cause of the plaintiff's nervous shock and her resulting illness, but placed its decision upon grounds which sufficiently appear in the following passage:

"We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance. The logical vindication of this rule is, that it is unreasonable to hold persons (who are merely negligent) bound to anticipate and guard against fright and the consequences of fright; and this would open a wide door for unjust claims, which could not be successfully met."

In *Dulieu v. White*,⁴¹ a modern English case, the more liberal view is presented. In that case it appeared that the defendant's servant had driven a van negligently into a public house which was kept by plaintiff's husband; plaintiff was behind the bar at the time; in consequence plaintiff was greatly frightened and sustained a severe nervous shock, later became seriously ill and finally suffered a miscarriage. Defendant contended that no action would lie in the absence of a physical injury resulting immediately from defendant's negligent act. The court conceded that fright caused by negligence was not in itself a cause of action but pointed out that here was an actual physical injury, and argued that the absence of impact in such a case ought to be regarded as immaterial. Kennedy, J., said in part:

"If.....as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact?.....Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference."

⁴¹ 2 K. B. (1901) 699.

§ 12. Actionable Negligence and Breach of Contract.

We have seen that liability for negligence does not depend upon contract; indeed, our whole discussion has so far proceeded upon that basis. It is equally true that one may be liable for breach of contract in countless cases where he is not liable for negligence. This is, of course, because the duties violated in the two classes of cases are wholly distinct. It remains to consider whether the same concrete act or omission may render a man liable for a negligent tort at the same time that it renders him liable for a breach of contract. That necessarily depends upon whether the same act or omission may constitute a breach of a contractual duty as well as of a duty independent of contract. A recent case will answer the question.⁴² The defendant agreed to erect a windmill upon the plaintiff's barn and to do the work in a first-class manner. The defendant erected the windmill in a negligent manner. In consequence of this defective construction, a wind of ordinary velocity caused the windmill to fall and seriously damage the barn. Here was a clear breach of contract and the defendant's liability upon that ground was not questioned; but the plaintiff had sued in an action for negligence. Held, that the defendant was liable. The court quotes with approval the following passage from Pollock on Torts:⁴³

"One who enters on the doing of anything attended with risk to the person or property of others is held answerable for the use of a certain measure of caution to guard against that risk. To name one of the commonest applications, 'those who personally go or bring property where they know that they, or it, may come into collision with the person or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such collision' In some cases this ground of liability may coexist with a liability on contract towards the same person, and arising (as regards the breach) out of the same facts. Where a man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circum-

⁴² Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491.

⁴³ Webb's Pollock on Torts, 533-536.

stances of the case. And this duty is not affected by the fact, if so it be, that he is acting for reward, in other words, under a contract, and may be liable on the contract. The two duties are distinct, except so far as the same party cannot be compensated twice over for the same facts, once for the breach of contract and again for the wrong."

CHAPTER II

STANDARD OF CARE

IN GENERAL

§ 13. **Necessity of an External Standard.** We have seen that negligence derives its importance as a ground of legal responsibility from the fact that it is a species of moral fault or culpability. We have also seen that negligence is a negative term, indicating a failure to exercise care. Now it is plain that we cannot justly blame a man for failing to exercise more care than he is personally capable of exercising. Men differ greatly from each other in wisdom, knowledge, and experience. From this difference necessarily results a corresponding difference in their capacity for acting with care. Were the law equipped with perfect agencies for testing the capacity of an individual it would perhaps hold every man liable only for that degree of care which he is personally capable of exercising; such a standard would be quite consistent with the modern notion of culpability as a basis of responsibility in tort. But, just as practical difficulties in the way of judging personal capacity lead men to praise or blame each other in non-legal relations by applying external standards of conduct, similar difficulties, accentuated by procedural limitations, compel the law to adopt similar standards. Thus, in a leading case,¹ it was held that the trial court did not err in instructing the jury that the defendant was bound to exercise the caution which a man of ordinary prudence would have exercised under the circumstances instead of instructing them that his liability depended upon whether he had acted "*bona fide* to the best of his judgment". The court contended that the personal standard would have been uncertain and impracticable, whereas the external standard adopted, the conduct

¹ Vaughan v. Menlove, 3 Bingham's New Cases 468.

of the man of ordinary prudence, had proved satisfactory in practice; thus basing its decision upon considerations of practical necessity rather than those of theoretical justice.

§ 14. Care Required of Normal Adults—Ordinary Care Defined. With reference to mentally competent adults it may be said generally that the law measures the duty of care not by individual capacity but by wholly external standards. The standard usually adopted is known as "ordinary care." Ordinary care has been defined as "the care that a person of ordinary prudence would exercise under the same circumstances."² It is important to note that this definition contains two essential elements. No definition of ordinary care can be complete without a reference to the imaginary "person of ordinary prudence"; hence it was held error to instruct a jury that the defendant was bound to use such care as an "ordinary man" would use under like circumstances, the court considering that a man might upon the sum of his various qualities be fairly deemed an ordinary man although lacking in the specific quality of ordinary prudence.³ So too a charge was held incorrect and misleading which defined ordinary care as "just such care as one of the jury similarly situated" might have used, for the obvious reason that it did not appear that every member of the jury was a man of ordinary prudence.⁴ The second element is equally important. There must be a reference to the particular circumstances; hence, an instruction which adopted as a standard "such care as persons of ordinary care ordinarily use" was held erroneous.⁵ Said the court:

"Ordinary care is the care ordinarily exercised by the great mass of mankind, or its type, the ordinarily prudent person, under the same or similar circumstances and the omission of the last qualification, 'under the same or similar circumstances' or 'under like circumstances' is error."

² St. Louis etc. R. R. Co. v. Finley, 79 Tex. 85.

³ Austin R. R. Co. v. Beatty, 73 Tex. 593.

⁴ Louisville R. R. Co. v. Gower, 85 Tenn. 465.

⁵ Yerkes v. No. Pac. R. R. Co., 112 Wis. 184.

§ 15. Care Required of Insane Persons. While the practical necessity of applying the external standard of the care that would be exercised by a man of ordinary prudence under like circumstances may be sufficiently apparent when the conduct of a normal adult is in question, it is obvious that different considerations will arise when the conduct of an insane person is involved. In the long run and in the great majority of cases, substantial justice will be done by exacting of all men of sound mind the care which a person of ordinary prudence similarly situated would exercise, for the simple reason that the great majority of sane men are of ordinary prudence; but there is inherent injustice in exacting of men of unsound mind the same standard of care, for the obvious reason that they constitute a class of persons uniformly without ordinary prudence. However, as regards these unfortunates, it must be confessed that the law of torts is in a backward state. Just as the growth of the notion that one ought not to be liable in tort, whose conduct was free from blame, resulted in exempting all persons from liability for the purely accidental consequences of their voluntary acts, so a recognition of the same principle would logically result in freeing insane persons from liability for the consequences of their intentional acts as well as of those acts which would be regarded as negligent if done by mentally competent persons.

But the law has not yet succeeded in taking such an advanced stand. Just as it insists on treating insane persons as responsible for their intentional acts, so it appears to exact of them the same care which it exacts of others. With respect to them it appears to adopt the old view that where one of two innocent persons must bear a loss, he must bear it, whose act caused it. Thus, where an action was brought against the master of a vessel for negligently causing its loss and the defendant relied upon insanity as a defense, it was held error to instruct the jury that, if the defendant were insane, he was not responsible for her loss through any conduct on his part which in a sane person would have constituted such negligence as would have

imposed responsibility.⁶ With respect to the standard of care applicable, Earl, J., said, in delivering the opinion of the court:

"I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: such care as a reasonably careful and prudent owner would ordinarily give to his own vessel.....The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence, yet the law takes no account of that, but requires that he should come up to the standard and his duty is measured thereby."

§ 16. Care Required of Children. Children are universally held liable for intentional torts. They are likewise held liable for the consequences of their negligent acts, when it has once been determined that they have been guilty of negligence. But when are they guilty of negligence? Must a child exercise the same care as an adult or does the law take note of the fact that he is a child and modify its demands accordingly? There seems no more reason for leniency in the case of sane children than in the case of insane adults. It has sometimes been affirmed that, like insane adults, all children are held to the same degree of care as persons of sound mind and full age.⁷ But this is open to question. The cases in which it has been necessary to determine the standard of care due from children are generally cases in which that question arose upon the defense of contributory negligence; but inasmuch as the same standard of care is ordinarily adopted whether the negligence in question be that of the plaintiff or of the defendant,⁸ we may perhaps treat these cases as authoritative upon the general question of the standard of care required of children. These cases have usually regarded the age of the child as having an important bearing upon

⁶ Williams v. Hays, 143 N. Y. 442.

⁷ Shearman & Redfield on Negligence (5th ed.) § 121.

⁸ Austin etc. R. R. Co. v. Beatty, 73 Tex. 593.

the care that might be required of it. Thus, in some cases, the courts have not hesitated to declare that a child so young as three or four years of age is incapable of exercising care.⁹ Other courts, while conceding that a child of such tender years ought not to be regarded as responsible, have said that it is impossible to establish a fixed period when a child becomes *sui juris* (of his own right) and that, in case of doubt in a particular case, the question ought to be left to the jury.¹⁰ But suppose it be admitted that a child is capable of exercising some care; must he exercise the same care that an adult of ordinary prudence would exercise under like circumstances? Or, while applying the external standard of ordinary prudence under the circumstances, shall we regard the standard as meaning, with respect to a child, the prudence of an ordinarily prudent child of the same age? Or shall we reject the external standard altogether and measure the particular child's duty by his individual capacity? We may reject the view that his duty should be measured by the same standard as that of an adult on the ground that it is obviously unjust.

As to whether the standard should be the conduct of children of equal age of ordinary prudence or a purely personal one, the decisions are not in harmony. If the only evidence of capacity is the age of the child the only practicable standard would seem to be an external one, viz, the conduct of a child of that age of ordinary prudence when similarly situated.¹¹ On the other hand, if there be evidence as to the particular child's capacity, it would seem that such evidence ought to be laid before the jury to enable them to determine whether or not he has been culpably careless. A recent Illinois case,¹² is in point. The plaintiff was a newsboy, between eleven and twelve years old, and had sold papers in the business district of Chicago from the age of nine. He had been in the habit of riding on

⁹ *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455.

¹⁰ *Stone v. Dry Dock Co.*, 115 N. Y. 104.

¹¹ *Idem*, footnote 10.

¹² *Ill. Iron & Metal Co. v. Weber*, 196 Ill. 526.

wagons, as opportunity offered, while going from his home to the business district. One day, by permission of the driver, he got on a wagon that was loaded with brick, standing up on the rear of the wagon and holding to the end gate. The wagon was one of a procession of loaded teams in a street-car track. The next wagon behind was being driven by defendant's servant. The pole of this wagon struck the plaintiff's leg, inflicting a serious wound. For this injury the plaintiff sought to recover damages. The defense was contributory negligence. The trial court told the jury that the plaintiff was bound to use with regard to his own safety the "ordinary care of a boy of his age". On appeal this instruction was held erroneous. After adverting to the plaintiff's age and experience, the court quoted with approval the following passage from Judge Thompson's *Commentaries on the Law of Negligence*:

"Two lads of equal age and natural capacity, one of them raised in the country and the other in the city, might approach a given danger, and the one would be perfectly competent to care for himself while the other would be helpless in the face of it. Therefore, the capacity, the intelligence, the knowledge, the experience, and the discretion of the child are always evidentiary circumstances—circumstances with reference to which each party has the right to introduce evidence, which evidence is to be considered by the jury."¹³

DEGREES OF CARE AND NEGLIGENCE

§ 17. Are There Degrees of Care and Negligence? From the discussion in the last section it appears that ordinary care as there defined is the standard usually adopted in determining whether or not a person has been guilty of negligence. But the expression "ordinary care" seems to imply that care may, in fact, be greater or less than ordinary. Does the law really recognize degrees of care and corresponding degrees of negligence? Some authorities have answered this question in the affirmative and others in the

¹³ Thompson, *Commentaries on the Law of Negligence*, Vol. 1, § 309.

negative. Some courts and writers have said that there are three degrees of care, great, ordinary, and slight, and that corresponding to them are three degrees of negligence, slight, ordinary, and gross. In a case in which they recognize a duty of great care, they would hold the defendant liable for slight negligence; where they recognize a duty of ordinary care they would not hold him liable for slight negligence but would hold him liable for ordinary negligence; and where they recognize a duty of slight care only they would hold him liable for gross negligence only.¹⁴ Others have contended that there are but two degrees of care, that which would be observed by a specialist with regard to the matter in hand, and that which would be exercised by a non-specialist, and consequently that there are but two corresponding degrees of negligence.¹⁵ Still others have insisted that there are no degrees of either care or negligence; that ordinary care is an adequate universal standard and that any failure to exercise ordinary care should be regarded as simple negligence.¹⁶ It has also been argued that even if we recognize varying degrees of care it is useless to recognize corresponding degrees of negligence since any failure to exercise the amount of care due under the circumstances will constitute actionable negligence, provided only that such failure is the legal cause of actual damage to the plaintiff.¹⁷

§ 18. Ordinary Care not always an Adequate Measure of Duty—Degrees of Care and Negligence Must Be Recognized in Certain Relations. In the nature of things there is no reason why the law should not prescribe the exercise of more than ordinary care in certain relations and yet exact less than ordinary care in others, while requiring only ordinary care in the average case. And this is what the law seems to have done. Thus, in the article on Bailments it appears that the law imposes upon a bailee the duty of

¹⁴ Burdick, *Law of Torts*, p. 422.

¹⁵ Wharton, *Negligence* (2d ed.) § 636.

¹⁶ *Lake Erie & Western R. R. Co. v. Ford*, 167 Ind. 205.

¹⁷ Bradley, J. in *N. Y. Cent. R. v. Lockwood*, 17 Wallace 382-384.

slight, ordinary or great care according as the bailment is for the exclusive benefit of the bailor, the mutual benefit of both bailor and bailee, or the exclusive benefit of the bailee; in the same connection it also appears that the law of bailments recognizes corresponding degrees of negligence. Since a bailor may maintain an action in tort against a bailee for damage resulting from the failure to observe the degree of care due in the particular case,¹⁸ it seems futile to declare that degrees of care and negligence have no place in the law of torts. Similarly, as will be seen in a subsequent section, the duty of care on the part of the occupier of land or buildings depends largely upon whether the person to whom the duty is owed is a trespasser, a licensee or a business visitor, being least in the case of the trespasser and greatest in the case of the business visitor.¹⁹

Again, as will be seen in the article on Carriers, the law imposes upon public carriers of passengers an extraordinary duty of care, requiring generally the highest degree of care of which human foresight is capable. Finally, statutes not infrequently prescribe varying degrees of care as requisite in certain cases.²⁰ In view of these considerations it is plain that ordinary care cannot be regarded as the true measure of the defendant's duty in all cases; in some relations the law does recognize degrees of both care and negligence and attaches considerable importance thereto. At the same time it cannot be fairly argued that these instances of an actual recognition of degrees of care and negligence prove that the law of torts regards such recognition as other than exceptional. Much less can it be contended that they show a general recognition of three distinct degrees.

§ 19. Ordinary Care the True Measure of Duty in Most Cases. Although it is true that ordinary care is not the exact measure of duty in all cases, we may, nevertheless, say that it is the true measure in the vast majority of cases. The amount of effort required to meet the demands of ordi-

¹⁸ Burdick, *Law of Torts*, pp. 16-17.

¹⁹ See *infra* §§ 22-29 of this ch.

²⁰ *Lanci v. Boston Elevated Ry.*, 197 Mass. 32.

nary prudence will of course vary with the circumstances. Everybody knows that more diligence is required in running a locomotive than in driving a family horse. None will deny that handling dynamite calls for the taking of greater precautions than does handling sand. And yet it is plain that the standard of care, the care which a man of ordinary prudence would exercise under the circumstances, may fairly be said to remain unchanged. Such a man will naturally regulate the amount of his active care, the nature and extent of his efforts to avoid doing harm, by the character of the circumstances that give rise to the particular danger. The general adequacy of ordinary care as a measure of duty is well illustrated by *Hill v. Glenwood*,²¹ a recent case in which a blind plaintiff sought to recover damages against a city for injuries which he alleged had resulted from the city's negligence in maintaining a sidewalk. The defense was contributory negligence. The trial court told the jury that it was incumbent upon the plaintiff to exercise "such care as an ordinarily prudent person would exercise under the circumstances." The defendant contended that this was erroneous, arguing that the conceded fact of the plaintiff's blindness made it the duty of the court to say to the jury that a blind person who attempts to use the public street "must exercise a higher degree of care and caution than a person ordinarily would be expected or required to use had he full possession of his sense of sight."

In upholding the instruction given, the higher court used this language:

"The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength and vision. The law casts upon one no greater burden of care than the other. It is true, however, that in determining what is reasonable or ordinary care we must look to the circumstances and surroundings of each particular case.....In the case before us the plaintiff's blind-

²¹ 124 Iowa 479.

ness is simply one of the facts to which the jury must give consideration, in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise, when burdened by such infirmity. In other words, the measures which a traveler on the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself; but the care thus exercised is neither more nor less than ordinary care—the care which men of ordinary prudence may reasonably be expected to exercise under like circumstances.”

Assumption of Skill. It may be thought that the standard of ordinary care is inadequate when applied to conduct in a matter requiring special skill. The following case may be put: suppose a man of ordinary prudence undertakes to act as a locomotive engineer or as an apothecary; that in the discharge of his undertaking he exercises all the care of which he, a man of ordinary prudence, is capable; and yet, from inexperience and lack of the special skill which all men know that such callings require, he brings disaster to others. Will he not be liable? The answer is that such a case is impossible. A man of ordinary prudence would not undertake to run a locomotive or compound a prescription unless he really possessed the skill that such an undertaking requires. Says Sir Frederick Pollock:

“A man of common sense knows wherein he is competent and wherein not, and does not take on himself things in which he is incompetent. If a man will drive a carriage, he is bound to have the ordinary competence of a coachman; if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon; if he will lay bricks, of a bricklayer; and so in every case that can be put. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft, and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril.”²²

²² Webb's Pollock on Torts, p. 26.

However, ordinary prudence would be entirely consistent with the attempt of an unskilled person to do in an emergency what would ordinarily be the work of a skilled person, as, for instance, to staunch a wound or to repair a broken machine, and in such a case he would doubtless escape liability if he made a reasonably prudent use of such skill as he possessed.²³

§ 20. Degrees of Negligence as Indicating Extent of Failure to Use Due Care. Up to this point we have dealt with the question as to whether there are degrees of care upon the assumption that if there are any such degrees they must have reference to duty owed. And this seems to be in accordance with the law; the only importance of degrees of care is to measure the extent of duty in certain relations. Treating negligence as a failure to exercise care, we have also assumed that if there are any degrees of negligence, they must have reference to the amount of negligence necessary to constitute a violation of duty and give rise to a cause of action. Courts frequently treat degrees of negligence as related to such a purpose. However, they apparently recognize degrees of negligence in a wholly different relation.

Let us assume that a given amount of care, say ordinary care, accurately measures the defendant's duty to the plaintiff in a given case. Any failure to exercise that duty, be the failure ever so slight, will, if it cause legal damage to the plaintiff, give him a cause of action; his cause of action would be no more complete if the failure had been very great or even if the defendant had actually intended to harm him.²⁴ And yet, it is obvious that the defendant might come very near to exercising ordinary care and still come short of it; or that, on the other hand, he might come very far from exercising that amount of care. In the first case we should be inclined to blame him very little; in common speech we should be disposed to say that his conduct was only slightly careless.

²³ *Idem.*, p. 28.

²⁴ *Grill v. General Iron Screw Collier Co.*, Law Reports, 1 C. P. 600.

In the second case we should be inclined to blame him very much; most of us would instinctively characterize his conduct as very careless. It is evident that the degree of the defendant's culpability depends entirely upon the extent of his failure to exercise the care that is called for by the circumstances. The courts have apparently felt this distinction. Very often they speak of a man's conduct as being only slightly negligent while admitting that it amounts to actionable negligence. Very frequently they characterize a man's conduct as amounting to gross negligence although recognizing that such negligence does not impose any greater liability than would such negligence as the same court might recognize as slight. Although such a usage is a perfectly natural one it clearly has no legal significance. As thus used the term "gross negligence" may fairly be said to mean "ordinary negligence with a vituperative epithet."²⁵

Exceptional Cases. Although it is true that ordinarily the extent of the failure to use due care is immaterial, in two cases at least the extent of defendant's departure from the path of duty becomes a very important consideration. In some instances statutes have made the defendant's liability depend upon the extent of his failure to exercise the care due under the circumstances. Thus, where a statute provided that if a person should be killed by the gross negligence of a railroad company his personal representatives might recover damages in an action against the company for the benefit of the widow and children, the court, after holding that the railroad company owed the "highest degree of care", said, in interpreting the statute:

"The term 'gross negligence' in a case where the degree of care due is the highest degree of care means that there has been a gross failure to exercise that degree of care."

The second case in which the extent of defendant's failure to exercise due care becomes of legal importance arises when he is conscious that his conduct is exposing the plaintiff to great danger but, nevertheless, persists therein, recklessly

²⁵ Lord Cranworth in *Wilson v. Brett*, 11 M. & W. 113.

disregarding the plaintiff's safety. In such a case, although he may not, in fact, have intended to harm the plaintiff, his wanton indifference to the latter's safety is treated by the law as the substantial equivalent of intentional wrongdoing. If the plaintiff is damaged by such conduct, the defendant is deemed guilty of an intentional tort. As in the case of other intentional torts, the defendant is deprived of the defense of contributory negligence,²⁶ and may properly be compelled to pay exemplary damages.²⁷ Indeed in such a case he may even be liable criminally.²⁸ The presence of a constructive intent makes the wrong different in kind from actionable negligence. On the other hand, the absence of an actual intent to injure makes the defendant's liability depend, in the last analysis, upon the character and extent of his failure to act with care. To this kind of conduct some courts have applied the term "gross negligence".²⁹

We may say, then, that this much-used expression has at least three distinct meanings as we meet it in the decisions: in one sense it means the amount of negligence required to constitute a breach of duty in certain relations; in another sense it means simply a wide departure from the duty of care without a conscious exposure of anyone to danger; in the third sense it comprehends both absence of care and indifference to another's safety. In the first and last senses the term has legal significance; in the second sense it is only an epithet. It is believed that many of the cases that are in apparent disagreement upon the general question as to whether there are degrees of care and negligence may be reconciled by carefully noting the exact sense in which the terms indicating such degrees are used by the respective courts.

²⁶ *Aiken v. Holyoke St. R. R. Co.*, 184 Mass. 269.

²⁷ *Ill. Cent. Ry. v. Stewart*, 63 S. W. 596.

²⁸ *Commonwealth v. Pierce*, 138 Mass. 165.

²⁹ *Ill. Cent. Ry. v. Stewart*, 63 S. W. 596.

**DUTY OF CARE ON PART OF MAKER OR VENDOR OF CHATTEL
TOWARD USERS OTHER THAN IMMEDIATE VENDEES**

§ 21. **General Rule—No Duty Owed.** We have seen that ordinarily the existence of a duty of care depends upon the probability of inflicting damage in case care is not exercised; but we have also seen that, like most rules of law, this is subject to exceptions. We are now to deal with a notable class of exceptions. This class is represented by the leading case of *Winterbottom v. Wright*.³⁰ The action was brought by the driver of a mail coach who had been seriously injured by the overturning of the coach. The coach had given way as the result of latent defects caused by negligent construction. The defendant had made the coach for the use of the English mail service under a contract with the postmaster general. Of course the plaintiff's right of action depended upon whether or not the defendant had owed him a duty to exercise care in the construction of the coach. The court held that the defendant had been under no such duty and that, therefore, the plaintiff could not recover. The case has been subjected to much criticism. If the action be regarded as an attempt on the part of the plaintiff to recover upon the defendant's contract with the postmaster general, the case seems clear enough, for the plaintiff was not a party to that contract; but if the gist of the action be regarded as negligence—a view of the case that has been generally adopted—it is difficult to reconcile the holding with the rule generally applied in determining the existence of a duty of care. Of course the defendant knew that the coach could not be used without a driver and he also knew that if the coach was unsafe it would be likely to break down and in so doing injure whoever happened to be driving at the time.

It seems clear, in other words, that the plaintiff's injury could have been anticipated by the defendant. Moreover, the existence of a contractual duty toward one person to exercise care in a certain matter certainly ought not to preclude the existence of a noncontractual duty toward another person to exercise care in the same matter under circum-

³⁰ 10 M. & W. 109.

stances in which it could easily be foreseen that a failure to exercise such care would endanger the safety of that other person. Nevertheless, *Winterbottom v. Wright* has been followed in a long line of cases and we may lay it down as a general rule, subject to more or less clearly defined exceptions, that the maker or vendor of a chattel owes no duty of care with regard to its manufacture or sale to any person who may use it other than the immediate vendee.³¹ By analogy the rule has been extended to the case of contractors who are guilty of negligent construction of buildings. A builder's liability for faulty construction extends only to the other contracting party; he is not liable to a third person who may be injured as a direct result of such faulty construction.

Exception—Articles Known to Be Dangerous to Life or Limb. When, however, one puts upon the market an article which he knows to be subject to a concealed defect that renders it imminently dangerous to life or limb and fails to give notice of its character, a different rule prevails. The culpability of the defendant in such a case is so aggravated that the courts appear to regard his conduct as something more than negligent and approaching closely to fraud. They do not hesitate to hold that he is liable to any person who sustains an injury from the use of the article when such an injury might reasonably have been anticipated. A case in point is *Lewis v. Terry*.³² The defendant had sold a folding bed which he represented to be safe but which he knew was unsafe and dangerous to use. The purchaser, supposing the bed to be as represented, put it in one of his rooms and rented the room to the plaintiff. The plaintiff, while preparing to retire, leaned against the side of the bed. This caused it to collapse. The plaintiff was caught between the upright and horizontal portions of the framework and seriously injured. The defendant contended that, according to *Winterbottom v. Wright*, there could be no recovery; but the court held that the doctrine of that case was inapplicable to

³¹ 31 Huse v. J. I. Case Threshing Machine Co., 120 Fed. 865.

³² 111 Col. 39.

the facts before it. Quoting from the opinion of Gray, J., in *Wellington v. Downer Oil Co.*,³³ the court said:

“It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person without notice of its nature and qualities, is liable for any injury which may be reasonably contemplated as likely to result, and which does, in fact, result therefrom, to that person or any other who is not himself in fault.”

Exception—Negligent Preparation of Drugs or Other Articles Intended to Affect Human Life. The leading case of *Thomas v. Winchester*,³⁴ will serve to introduce us to another line of cases to which the doctrine of *Winterbottom v. Wright* has been held inapplicable. In that case the defendant, a manufacturing druggist, had put up a jar of belladonna and negligently labelled it “dandelion”. In the course of trade he sold this jar to another druggist, who in turn sold it to a third. The third druggist used a portion of it for dandelion in filling a prescription for the plaintiff. The plaintiff consequently took belladonna in accordance with her physician’s directions for taking dandelion; as a result she was poisoned and made seriously ill. Owing to the similarity of the two drugs the false label had misled even the druggist who filled the prescription. According to the principles ordinarily applicable in negligence cases the defendant was clearly liable; but he sought to escape under the doctrine of *Winterbottom v. Wright*. The court, however, distinguished that case and in so doing practically recognized an exception to the exception. Said Ruggles, C. J., in delivering the opinion of the majority:

“If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to . . . his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. . . . But the case in hand stands on different ground. . . . The death or great bodily harm of some person was the natural and almost inevitable

³³ 104 Mass. 64.

³⁴ 6 N. Y. 397.

consequence of the sale of belladonna by means of the false label. . . . The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution or that the exercise of that caution was a duty only to his immediate vendee whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement."

In *Blood Balm Co. v. Cooper*,³⁵ the rule of *Thomas v. Winchester* was extended to a case where the plaintiff had been made ill through the negligence of the manufacturer of a proprietary medicine in prescribing an excessive dose, although the medicine was not a deadly poison. In *Bishop v. Weber*,³⁶ the same principle was applied to the following state of facts: The defendant was employed as caterer for a musicians' ball. The plaintiff attended the ball and was poisoned by eating unwholesome food that had been negligently provided by the defendant. Said the court:

"The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any privity of contract between the parties."

What is the common element in this line of cases? Judge Sanborn, in an able opinion in a recent case,³⁷ says that it is "an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation of an article intended to preserve, destroy, or affect human life." His statement is believed to be accurate. The case of *Winterbottom v. Wright* has created a somewhat arbitrary exception to the general principles of liability for negligence. This exception is to be justified, if at all, by the possible inexpediency of hampering trade by imposing liability upon manufacturers and sellers in favor of remote vendees; but such a justifica-

³⁵ 83 Ga. 457.

³⁶ 139 Mass. 411.

³⁷ *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865.

tion must fail where human life and health are involved just as it must also fail where the maker or vendor acts in bad faith as in *Lewis v. Terry*.³⁸

DUTY OF CARE ON PART OF OWNER OR OCCUPIER OF LAND

(A) In General.

§ 22. **Duty Dependent upon Special Considerations.** The duty of care that is owed by the owner or occupier of land or buildings is another exception to the general rule by which the existence of a duty of care is ordinarily determined. Of necessity the law cannot make his duty to exercise care in the use of his premises depend entirely upon the probability of actual damage resulting to somebody else in case they are used in a particular way; it must have some regard for the recognized right of the landowner to make a beneficial use of his land. Indeed it is the policy of the law to allow freedom in the use of property as well as to prevent harm to individuals. Now it often happens that a man cannot use his land as he desires without at the same time causing an actual loss to a neighboring landowner; the business that he maintains may be injurious to his neighbor's health or the building that he erects may cut off his neighbor's view. In such a case the neighbor's right of action depends entirely upon whether the particular use constitutes a nuisance; it may be said generally that a landowner or occupier may, so far as the rights of a neighboring landowner are concerned, do anything upon his own land that does not amount to a nuisance.³⁹ Oftentimes, however, the person harmed is not a neighboring landowner, but an individual who comes upon a particular tract of land or into a particular building and there sustains an injury as a result either of the condition of the premises or of the active conduct of the owner or occupier. It is with this class of cases that we are here primarily concerned. But here, too, we meet with the same conflicting considerations: on the one hand is the safety of an individual; on the other is freedom in the use of property. The result is a

³⁸ 111 Cal. 39.

³⁹ *Lane v. Concord*, 70 N. H. 485.

sort of compromise and a group of special rules. The law appears to distinguish between the condition of the premises and the owner's or occupier's active conduct upon them, requiring generally less care as to the former than as to the latter. So, too, much depends upon the degree of danger in the particular case. The landowner's knowledge of the danger is often an important factor. But the rules by which the landowner's duty of care in this class of cases is ordinarily determined appear to be based principally upon the consideration as to whether the person injured was, at the time of his injury, a trespasser, a licensee, or a business visitor. From that point of view the law of this subject will now be considered.

(B) Duty of Care Toward Trespassers

§ 23. Condition of Premises—General Rule. Whether a person enter upon land as a trespasser, a licensee, or a business visitor he cannot demand that the premises be in a safe condition to receive him. * So long as a man avoids the maintenance of a nuisance upon his premises he is not bound to keep them in any particular condition. * Toward those to whom he owes the highest duty of care he has the option of making a reasonable effort to keep his premises safe or, in the absence of such an effort, of giving reasonable notice of their unsafe condition; but it is only a few toward whom his duty of care is even so great as that. Toward a trespasser the landowner ordinarily owes no duty of care with respect to the condition of his premises; he is not bound to try to make them safe or to give notice of their unsafe condition. He may allow his land or buildings to become unsafe and may refrain from warning the trespasser. If a trespasser is injured in consequence, the law regards it as nobody's fault but his own; if a man will trespass he must assume all risk as to the condition of the premises.⁴⁰ It should be remembered that we are here dealing with liability for negligence. Of course a landowner could not deliberately alter the condition of his premises in

⁴⁰ Lary v. Cleveland R. R. Co., 78 Ind. 323.

such a way as practically to set a trap for an anticipated trespasser and then escape liability to a trespasser who is caught in the trap on the ground that he was not bound to keep his premises safe for trespassers.⁴¹ In such a case the trespasser's injury would be intentional rather than negligent. It is one thing to negligently allow premises to become unsafe; it is another thing to intentionally make them unsafe with a view to injuring trespassers. If, while trespassing upon another's land, a man is injured by falling down an abandoned shaft, it is plain that he cannot recover; but if he is injured by the discharge of a spring gun that was set for the very purpose of injuring him, it is equally plain that he may recover.

In this connection it should also be observed that there is some authority for holding that where there is special reason to anticipate the presence of a trespasser, a change of the condition of the premises in such a way as seriously to endanger his safety may make the landowner liable to the trespasser for an injury caused by such alteration although there was no intention to harm him. In such a case the landowner appears to be held for the consequences of negligently setting a trap, the court apparently taking a distinction between negligently allowing premises to be unsafe and negligently making them unsafe. Thus, where for the purpose of painting a neighboring building, a painter swung a scaffold to the defendant's chimney, and the defendant, in the painter's absence unfastened the rope by which it was attached to his chimney but negligently allowed the scaffold to remain in apparent security, the defendant was held liable to the painter for an injury which the latter received when later he stepped upon the scaffold.⁴² The case was a strong one for the plaintiff; it would seem that the defendant's conduct was almost reckless; and it is probable that the landowner's reasons for anticipating the presence of a trespasser must be very strong indeed to make him liable for the consequences of a change in the condition of his premises. Ordinarily, as we have seen, he owes the

⁴¹ *Hooker v. Miller*, 37 Iowa 613.

⁴² *Phillips v. Wilpers*, 2 Lansing 389.

trespasser no duty with respect to the condition of his land or buildings.

Duty Toward Children with Respect to Dangerous Machinery; the "Turntable Cases." A railway company maintains a turntable in one of its yards. It is an easy matter to lock it securely, but the company's employees leave it unfastened. Children may easily move it about the pit by pushing upon the lever. The company does not permit them to play with the turntable, but it does not try to prevent their doing so. Indeed, the location of the machine is such as to make it an actual attraction to children. While a group of them are engaged in moving it one of them falls or makes a misstep and is caught in the machinery and seriously injured. These facts are typical of many cases that get into the courts. These cases constitute a distinct group known as the "turntable cases" and have established an exception to the general rule that the landowner owes no duty to trespassers with respect to the condition of his premises. They are usually decided upon the ground that a turntable is peculiarly attractive to children and constitutes such an alluring temptation that a railroad which maintains one and leaves it insecurely fastened in a neighborhood where children may be expected to congregate, may fairly be regarded as not only permitting but actually inducing children to play upon it. Said one court in a leading case:⁴³

"The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turntable by the defendant's own conduct, and that, as to him, the turntable was a hidden danger—a trap."

Some courts are inclined to extend the exception to all sorts of machinery that are dangerous to children and particularly attractive to them.⁴⁴ Some courts have gone so

⁴³ *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207.

⁴⁴ *Cahill v. Stone & Co.*, 153 Cal. 571.

far as to apply the principle to an unguarded pond of water on a city lot,⁴⁵ although other courts refuse to follow them in this application of the principle.⁴⁶ Other courts, while recognizing the exception as applicable to turntables, hesitate to extend it to other classes of machinery.⁴⁷ Still other courts refuse to recognize any exception based upon the special attractiveness of dangerous machinery to children, contending that the only logical view is that a child who plays upon a turntable or other dangerous machine without the owner's permission is a mere trespasser and therefore assumes the risk. Said one of them:

"The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."⁴⁸

It must be admitted that it is difficult to tell where to draw the line when once the principle of the turntable cases has been adopted. It is probable that such practical considerations as the legal value of human life, the law's tendency to throw special protection over children, and the extreme ease and cheapness with which such machinery as turntables may ordinarily be made safe have had much to do with the general recognition of the exception.

§ 24. Active Conduct—Duty of Care When Trespasser's Presence Is Known. It may be laid down as a general rule that whenever a landowner or occupier has actual knowledge that a trespasser is upon his premises he must take care not to injure the trespasser by his active conduct. This is well illustrated in *Herrick v. Wixom*.⁴⁹ The plaintiff had gone into the defendant's circus tent without a ticket and as a mere trespasser. While he was there the defendant exploded a giant firecracker as one of the features of the show. At the explosion part of the firecracker flew and

⁴⁵ *City of Pekin v. McMahon*, 154 Ill. 141.

⁴⁶ *Peters v. Bowman*, 115 Cal. 345.

⁴⁷ *Savannah etc. Ry. v. Beavers*, 113 Ga. 398.

⁴⁸ *Frost v. Eastern Railroad*, 64 N. H. 222.

⁴⁹ 121 Mich. 384.

struck the plaintiff in the eye, causing him to lose the sight of his eye. It was not disputed that the defendant was negligent in exploding the firecracker inside of the tent and in the presence of the audience but it was contended that, as plaintiff was a trespasser, defendant owed him no duty of care. In ruling for the plaintiff, the court said:

“It is true that a trespasser who suffers an injury because of a dangerous condition of premises is without remedy. But where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages. In this case the negligent act was committed after the audience was made up. The presence of the plaintiff was known, and the danger to him from a negligent act was also known. The question of whether a dangerous experiment should be attempted in his presence, or whether an experiment should be conducted with due care and regard to his safety, cannot be made to depend upon whether he had forced himself into the tent. Every instinct of humanity revolts at the suggestion.”

In the case last examined the plaintiff had trespassed in person. Now let us suppose a case in which the plaintiff himself did not go upon the defendant's land but that his cattle did and that while they were trespassing one of them was injured by the defendant's active conduct; suppose further that the presence of the cattle was known to the defendant and that he could have avoided injuring any of them by the use of ordinary care: could the plaintiff recover in such a case? Of course the considerations of humanity are not so strong; the safety of human beings is of greater consequence in the eye of the law than is the safety of cattle; but the law has too much regard for valuable property to permit the landowner to act without regard to the safety of livestock which he knows to be trespassing. If a locomotive engineer sees a horse on the track he may not carelessly run over it and then excuse himself on the ground that the horse was trespassing on the right of way.⁵⁰

⁵⁰ *Locke v. R. Co.*, 15 Minn. 283.

Duty of Care When Presence of Trespasser Is Not Known.

If, however, the presence of the trespassing person or property is not known to the landowner or occupier a very different question arises. Must the landowner keep a lookout for trespassers upon his land just as he would have to keep a lookout for travelers if he traveled upon a highway? It would seem unjust to require him to do so. In the first place there is usually no reason to suppose that a trespass will probably occur; men usually do not go upon the land of others without permission nor do they suffer their livestock to do so. In the second place it would seem an undue limitation upon the free use of land to require the occupier to conduct his operations with reference to the probability of injuring trespassers not known to be present unless there were some special reason to anticipate their presence. For one or the other or perhaps both of these reasons the law does not require the landowner to anticipate the presence of trespassers in the ordinary case. This principle receives a striking application in those cases in which it is held that a railway company owes no duty to keep a lookout for persons,⁵¹ or livestock,⁵² on its right of way.

Where, however, the circumstances known to the defendant are such as to make it extremely probable that a trespass will occur, the law will not permit the landowner to shut his eyes to that fact and conduct himself as though no danger were to be anticipated. The case approaches very closely to that in which the presence of the trespasser is actually known and a similar regard for human life and valuable property results in the recognition of a similar duty of care. This is well illustrated in *Fearons v. Kansas City Elevated R. R. Co.*⁵³ The action was to recover for the death of the plaintiff's husband who was run over in a tunnel by one of the defendant's cars. It appeared that the deceased was walking through the tunnel as a trespasser at

⁵¹ *Sheehan v. St. P. & D. R. R. Co.*, 46 U. S. Appeals 498.

⁵² *Palmer v. N. P. R. Co.*, 37 Minn. 223.

⁵³ 180 Mo. 208.

the time he was run down and that his presence was not observed by those in charge of the car; but it also appeared that the defendant's motorman and conductor knew that it was the custom and daily habit of numerous persons to use this tunnel as a passageway. The court conceded that ordinarily the operatives of a railway are entitled to the presumption that there is a clear track and are not responsible for failure to be on the alert to discover the presence of trespassers; but it nevertheless held that, in a case like this where there was special reason to anticipate the presence of trespassers, those in charge of a moving car are not entitled to the presumption of a clear track but are bound to keep a close lookout for those whose presence they have special reason to anticipate and are, therefore, liable for the consequences of their failure to do so. On principle it would seem that the knowledge of special circumstances rendering it extremely probable that livestock will be found trespassing at a particular time and place must make it the duty of the landowner to anticipate their presence and guard against injuring them by his actions, although this limitation on the general rule does not seem to be clearly established.⁵⁴

(C) Duty of Care Toward Licensees

§ 25. **In General.** A trespasser enters upon land without the owner's permission and as a mere wrongdoer. A licensee enters upon it with the owner's permission and in the violation of no law. So far as the landowner's duty of care is governed by what he ought to anticipate it is plain that his duty toward the licensee will tend to exceed his duty toward the trespasser, since there is usually greater reason to expect that a normal man will avail himself of a permission to enter upon land than there is to expect that he will become a wrongdoer by entering thereon without permission. So far as that duty is affected by considerations of policy it is equally plain that the licensee will tend to occupy a more favorable position than the trespasser, for, whereas it may be sound policy for the law to discourage

⁵⁴ *Palmer v. N. P. R. R. Co.*, 37 Minn. 223.

trespassing by casting risks upon the trespasser, there can be no such policy in discouraging an entry upon property when the owner himself has consented thereto. For these reasons we may say that in a general way the owner or occupier of land owes a higher duty of care toward the licensee than he owes toward the trespasser. The nature and extent of this duty will now be considered.

§ 26. Condition of Premises. The landowner is, of course, not bound to keep his premises in a safe condition for the coming of licensees; nor is he bound to warn them of obvious dangers.⁵⁵ Furthermore, he owes them no duty to endeavor to discover whether there are any hidden dangers that render his premises unsafe. Thus, where a licensee was injured by a piece of glass that fell from a door which the owner had negligently allowed to be in a state of disrepair it was held that the licensee could not recover in the absence of a showing that the owner actually knew of the unsafe condition of the door.⁵⁶ To this extent the landowner's duty toward licensees is substantially equivalent to his duty toward trespassers. In one respect only does his duty toward the two classes differ as regards the passive condition of his premises: although he need not warn trespassers of the existence of hidden dangers, he must warn licensees of the existence of such dangers provided that he actually knows of their existence. Thus, where the defendant permitted the plaintiff to use a bridge which was apparently safe but which the defendant knew to be in an unsafe condition and the plaintiff was injured through the giving way of the bridge, it was held that the plaintiff could recover.⁵⁷

Change of Condition after License Given. Unless the circumstances are such as fairly to warrant us in accusing the landowner of setting a trap for the trespasser he is ordinarily not responsible for an injury to a trespasser in consequence of a change in the condition of his premises any more than where the injury results from their passive

⁵⁵ Bolch v. Smith, 7 H. & N. 736.

⁵⁷ Campbell v. Boyd, 88 N. C. 129.

⁵⁶ Southcote v. Stanley, 1 H. & N. 247.

condition.⁵⁸ With respect to licensees, however, the case is different. It is a general rule that the licensor has no right to create a new danger while the license continues. This rule is well illustrated in *Carskaddon v. Mills*.⁵⁹ The public had been accustomed to drive over a lot belonging to the defendant. The defendant decided to revoke the license and then put a barbed wire across the way which had been commonly used. The plaintiff, who lived in the neighborhood, had frequently driven over this way and had no notice or knowledge of its being closed up with the wire. Indeed no notice of any kind had been given of this obstruction otherwise than as it gave notice of itself. On a dark night the plaintiff started to drive across the defendant's lot upon the accustomed road. Unable to see the wire he drove his horse against it. In consequence the animal was seriously injured. Held, that the license was unrevoked as to the plaintiff and that he could, therefore, recover.

§ 27. Active Conduct. That the landowner is liable for the consequences of his failure to exercise care toward a trespasser with respect to his active conduct, as distinguished from the mere condition of his premises, has already been shown.⁶⁰ It follows necessarily that, with respect to such conduct, he is also bound to exercise care toward a licensee whose presence is known. Suppose, however, that the licensee's presence is not known: it is plain that, since the licensee's legal position is superior to the trespasser's, the mere fact that the landowner is under no duty to anticipate the presence of a trespasser is no reason for supposing that he owes no such duty to the licensee. Indeed, it would be singular if a man might give another permission to go upon his premises and then order his subsequent conduct utterly without regard to the probability of that other's availing himself of the permission given. Accordingly, we find that the licensor is under a duty to anticipate the presence of the licensee and to guard against injuring him. This seems to be the clear implication of

⁵⁸ 5 Ind. App. 22.

⁶⁰ See *supra*, footnote 49.

⁵⁸ See *supra*, footnote 57.

Gallagher v. Humphrey,⁶¹ a case in which a licensee recovered for a personal injury received from the breaking of a crane which the defendant was operating on his premises. The crane broke because of a defective chain. It did not appear that the defendant actually knew that the plaintiff was present and in danger from the unsafe condition of the crane, but it did appear that the defendant knew that "people were in the habit of passing below, and that danger would arise if the chain broke."

(D) Duty of Care Toward Invited Persons

§ 28. Duty of Care toward Persons Invited on Business. Just as the landowner's duty of care toward licensees is greater than his duty of care toward trespassers, so his duty of care toward business visitors is greater than his duty of care toward licensees. A business visitor is a person who goes upon another's premises under an express or implied invitation to go there for business purposes. Since an invitation necessarily includes a license it is obvious that the business visitor occupies at least as favorable a position as the licensee; the landowner must, therefore, guard against injuring him by his active negligence whether he knows of his presence or not; similarly, the landowner must warn the business visitor of all hidden dangers of which he actually knows. The position of the business visitor is more favorable in this respect: the landowner must not only warn him of the dangers of which he is aware but must also exercise reasonable care to ascertain the condition of his premises and either to make them safe or to give him notice of their unsafe condition.⁶² To illustrate: the defendant owns a dock at the bottom of which a ledge of rock is imbedded in the mud in such a way as to be dangerous to vessels in the dock; the defendant does not know of the existence of this ledge, but could know of it by the exercise of reasonable diligence; the plaintiff's vessel enters the dock and grounds upon the ledge. In the case as put, the defendant's liability depends upon whether the vessel

⁶¹ 6 L. T. R. N. S. 684.

⁶² *Indermaur v. Dames*, L. R. 1 C. P. 274.

came to the dock on business. If it came there under a mere license the owner of the dock will not be responsible, since he did not know of the hidden danger; but if it came there for repairs or to receive or unload a cargo under a business arrangement with the defendant the plaintiff can recover, since it was the defendant's duty to know of the danger and either remove it or give the plaintiff warning.⁶³

§ 29. Duty of Care toward Social Guest. What is the basis of the distinction in favor of the business visitor as opposed to the licensee? Is it the fact that he is actually invited or is it the fact that the landowner has an economic interest in his coming? If it be the former then a social guest who comes upon an actual invitation ought to be entitled to the same protection as the business visitor; if it be the latter then the position of the social guest ought clearly to be no more favorable than that of the licensee. The law upon this point does not seem to be well settled. In England the leading case of *Southcote v. Stanley*,⁶⁴ seems to have established the rule that a social guest is to be treated as a mere licensee. In the United States there is very little authority upon the point and the cases are not harmonious.⁶⁵

(E) Duty of Care Toward Users of Adjacent Public Way

§ 30. Nature and Extent of Duty. It is an ancient doctrine of the common law that no man is bound to fence his land. *A* may maintain a pit on his land just across the line from *B*'s land. If *B* chances to lose his way in the darkness of night and falls into the pit he must take the consequences, although *A*'s land was unfenced and his pit unguarded.⁶⁶ The law regards *B* as a mere trespasser. Suppose, however, that this pit is immediately adjacent to a public sidewalk and that *B*, while using this sidewalk on a dark night, makes a misstep and falls into the pit. It is plain that he might do so without being chargeable with

⁶³ *Garfield Coal Co. v. Rockland Lime Co.*, 184 Mass. 60.

⁶⁴ 1 H. & N. 247.

⁶⁵ *Barman v. Spencer* 49 N. E. (Ind.) 9.

⁶⁶ *Lary v. R. R. Co.*, 78 Ind. 323.

lack of ordinary care. Will the law still treat him as a mere trespasser who must take the risk as to the condition of the premises? If the law did that it is plain that adjacent property owners might, by excavating for building or other purposes and leaving their excavations unguarded, render public highways actually unsafe for public use. In the conflict between public safety and private property, the law naturally takes the side of the public; so *B* could recover if he stepped into the pit from the sidewalk although he could not have done so had he stepped from his own land. To users of adjacent public highways the landowner or occupier owes a duty to maintain proper railings or barriers against dangerous objects or excavations. How close the dangerous thing or place must be to the highway in order to give rise to this duty is uncertain. In one case it was held that a distance of six feet was too great,⁶⁷ but in another case it was held that a distance of ten feet was not.⁶⁸ Other cases require such nearness as to make the highway itself practically unsafe for travelers, leaving it to the jury to apply that test to the facts of each case. This would seem to be the true rule.

⁶⁷ *Early v. Lake Shore R. Co.*, 66 Mich. 349.

⁶⁸ *Malloy v. Hibernia Sav. Soc.*, 21 Pac. (Cal.), 525.

CHAPTER III

LEGAL CAUSE

RELATION OF LEGAL CAUSE TO NEGLIGENCE

§ 31. **In General.** The subject of Legal Cause is a very important one in the law of Torts as well as in the law of Damages. In each of these branches of the law it has to do with the problem of fixing responsibility for particular items of actual damage. A defendant may have done an act or engaged in a course of conduct. This act or course of conduct may appear as a link in a physical chain of causation that ends in consequences more or less harmful to the plaintiff. Assuming that the defendant's action was wrongful with respect to the plaintiff and that the harm sustained by the plaintiff is of a kind that the law will regard as amounting to actual damage, the specific problem of legal cause is to determine to which, if any, of these consequences the defendant's responsibility extends. Speaking generally, the defendant will be deemed responsible for those consequences of which his wrongful act or conduct may be said to be the legal cause. The considerations which influence the courts in deciding what may or may not be the legal cause of a particular harm are by no means confined to questions of physical causation. Quite often matters of policy and expedience are treated as decisive; and yet problems of legal cause are usually discussed in terms of physical causation. The foregoing remarks apply to legal cause in general and regardless of whether the subject be viewed from the standpoint of torts or of damages. Nevertheless legal cause is seen in a different phase as we pass from one of these fields to the other. No problem in the law of damages as such ever arises until the plaintiff's cause of action is complete; the law of damages assumes a completed tort or a breach of contract and seeks only to prescribe rules for the assessment

of damages therefor. Hence, the problem of legal cause in the law of damages is to establish the limits to which the defendant's liability for his tort or breach of contract may be deemed to extend for the purpose of estimating damages.¹ Legal cause in the law of torts deals rather with the problem of ascertaining when a cause of action is complete. It will be remembered that some torts, *e. g.*, conversion, libel and trespass to real property, are complete without actual damage, but that other torts, *e. g.*, deceit, nuisance and negligence, are not complete until actual damage results from the defendant's wrongful act.²

It is in dealing with the class of torts that are incomplete in the absence of actual damage that the importance of legal cause in the law of torts appears. Were the rules of legal cause founded entirely upon considerations relating to physical causation it seems obvious that the distinction just noted would be quite unimportant for practical purposes, but, as they are not so founded, the distinction is one of real importance and renders necessary separate treatments of legal cause in torts and damages. Indeed, the rules of legal cause are not uniform in their application to the several torts of which damage is an essential element. We have seen that legal cause involves considerations of policy and expedience as well as of causation; and what is politic and expedient in dealing with deceit or nuisance or defamation is not necessarily so when dealing with negligence. It is with legal cause as applicable to the law of negligence that we are here concerned. Since the plaintiff in every action for negligence must be able to prove that the defendant's negligence has caused him actual damage, we are confronted with this specific problem of legal cause: under what circumstances will the courts regard the plaintiff's damage as caused in a legal sense by the defendant's negligence?

§ 32. Defendant's Negligence Must be Proximate Cause of Plaintiff's Damage. *Meaning of "Proximate Cause".*

¹ For Legal Cause in its relation to Damages, see Sedgwick, *Elements of Damages*, 2d ed. ch. 5.

² See Article on Torts.

Let us assume that the defendant owed a particular duty of care toward the plaintiff, that he failed to exercise this care, that the plaintiff has sustained damage, and that the damage sustained is of a character that the law deems sufficient to complete an action for negligence. Our sole problem is now to determine whether or not this damage was caused in a legal sense by the defendant's breach of duty.³ One thing is obvious: the defendant's conduct must in a physical sense have sustained a causal relation to the plaintiff's damage. It need not have been the sole cause; it is impossible to single out any one event that is the sole cause of any other event. Strictly speaking, the cause of any event is the sum total of all its antecedents.⁴ But the defendant's negligence must at any rate have been one of the antecedents of the plaintiff's damage; it must have been one of the causes which, working together, have wrought harm to the plaintiff. This seems too plain for discussion. But it is not enough that the defendant's negligence was one of the antecedents, not enough that it was a part of the actual cause or one of the actual causes; it must have been what the law recognizes as the proximate cause. Bacon, in his *Maxims of the Law*, says:

"It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree."⁵

The same idea is expressed in the ancient and oft-quoted maxim "*In jure non remota causa sed proxima spectatur*"—in law the proximate and not the remote cause is to be looked to. What then is the proximate cause? Originally and as conceived by Bacon, the proximate cause seems to have been that cause which was nearest in time or distance; it stood for a definite physical relation. The expression "proximate cause" is still sometimes used in that special, restricted sense; but today it ordinarily means that

³ See § 10.

⁵ *Maxims of the Law*, Reg. 1.

⁴ Mill, *Principles of Logic*, Book iii, ch. v.

particular antecedent or cause of the plaintiff's damage which the courts treat as the legal cause for the purpose of fixing responsibility. It will be seen that the proximate cause is simply the legal cause under a different name. At one time it meant something definite and concrete to say that the legal cause is the proximate cause; today it means no more than to say that the legal cause is the legal cause, a mere circumlocution. The law has outgrown its phraseology, in this respect, but it clings tenaciously to its phraseology notwithstanding. It tells us that the defendant will not be liable unless his negligence is the proximate cause of the plaintiff's damage. It leaves us with the problem restated. Instead of inquiring what is the legal cause we must ascertain what is the proximate cause.

§ 33. Defendant not Liable for Remote Consequences.
Meaning of "Remote Consequences". Another matter of terminology has yet to be considered for the purpose of avoiding confusion. Just as it is said that a negligent defendant will be liable for those consequences of which his negligent conduct is the proximate cause, so it is said that he will be liable for the proximate consequences of his negligence. Conversely it is said that he will not be liable for those consequences of which his negligence is the remote cause and, accordingly, that he will not be liable for the remote consequences of his negligence. The word "remote" like the word "proximate" naturally suggests time and distance as controlling elements. But the two words have had a similar legal history. A remote consequence at one time meant in law, a consequence actually remote in time or distance. Courts frequently have occasion even now to use the expression in that sense just as they often have occasion to speak of "proximate cause" and "proximate consequence" to indicate actual proximity in time or distance; for it will presently appear that time and distance are often important in solving particular problems of legal cause. But the oft-stated general rule that a man is not liable for the remote consequences of his acts will lead inevitably to error and confusion if it be not remembered that "remote conse-

quences", as used in this rule, means simply those consequences to which the defendant's responsibility does not extend. Just as the statement of the rule as to proximate cause left us to inquire what is a proximate cause, so the rule as to remote consequences leaves us with a similar problem. Each rule, when correctly understood, appears as a mere restatement of the fundamental problem of legal cause. Misunderstood and taken literally, it is worse than useless. It leaves us with the impression that legal cause is a mere matter of physical causation as related to time and distance, whereas, the truth is that although physical causation and its relations to time and distance are important considerations, they are by no means the sole considerations. As already pointed out, legal cause, although usually discussed in terms of physical causation, is in reality a matter of fixing responsibility for damage sustained. We shall see that, whatever the phraseology employed in particular cases, the courts uniformly endeavor to apply broad principles of justice and policy as well as rules of mere causation in ascertaining whether or not a particular cause or consequence is "proximate" or "remote".

§ 34. Proximate Cause a Mixed Question of Law and Fact. Is the question as to whether a particular cause or consequence is "proximate" or "remote" one of law or of fact? It is difficult to give a direct answer. Sometimes the question as to whether a particular wrongful act of the defendant's is the legal or proximate cause of actual damage to the plaintiff is presented on the pleadings.⁶ Sometimes it is presented on special findings by the jury.⁷ In each of these cases the question must be answered by the court and is, therefore, practically a question of law. Usually, however, such questions arise with reference to evidence presented at the time of trial. Where the evidentiary facts are in dispute there is necessarily a case for the jury. But suppose the facts are not in dispute: may the question of proximate cause be answered by the court or must it be left to the jury?

⁶ McDonald v. Snelling, 14 Allen 290.

⁷ Salisbury v. Herchenroder, 106 Mass. 458.

It seems to be generally agreed that if, upon applying the law to the undisputed facts, only one reasonable inference can be drawn, the court should answer the question itself, nonsuiting the plaintiff or directing or setting aside a verdict for either the plaintiff or the defendant or taking such other action as the facts and the course of procedure may determine.⁸ However, the case is usually not so plain. Generally it is impossible to say that only one inference could be reasonable. Often a court may fully believe that sound logic calls for a particular inference and yet be perfectly willing to concede that a contrary inference would not be unreasonable. What, then, should the court do in the one case in which the facts are undisputed but more than one inference might reasonably be based on such facts? Here we find a difference of opinion. In England the rule seems to be that the court should settle the matter. Said Lord Blackburn in a leading case:⁹

“I do not think the question of remoteness ought ever to be left to the jury. That would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was left generally to the jury to say whether the damage was too remote or not.”

This view that legal cause is essentially a question of law is not without support in this country;¹⁰ but the prevailing American view is that it is ordinarily a question of fact. Said Mr. Justice Strong in a leading case:¹¹

“The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.”

This does not mean, of course, that the question is to be left to the jury without instructions. It is the duty of the

⁸ *Mars v. Delaware & Hudson Canal Co.*, 54 Hun. 625.

⁹ *Hobbs v. London & S. W. Ry.*, L. R. 10 Q. B. 11.

¹⁰ *Ladd J.*, in *Gilman v. Noyes*, 57 N. H. 627.

¹¹ *Milwaukee Ry. v. Kellogg*, 94 U. S. 469.

court to instruct the jury as to the principles and rules by which they should be guided in endeavoring to reach a conclusion. These principles and rules will now be considered.

RULES FOR DETERMINING LEGAL CAUSE

§ 35. Ordinarily Defendant's Negligence Must Have Contributed Essential Element to Production of Plaintiff's Damage. It may be that the defendant has been negligent toward the plaintiff, that the plaintiff has sustained actual damage, and that the defendant's negligence appears to have been one of the antecedents which have produced the particular situation or group of circumstances in which the plaintiff's damage has been sustained; and yet it may also appear that the same damage would have occurred even if the defendant had exercised due care and the situation or circumstances had, accordingly, been somewhat different. In such a case it would seem that the defendant's negligence might well be disregarded for the purposes of fixing legal liability. If the plaintiff would have suffered in precisely the same way in case the defendant had exercised due care it seems difficult indeed to attribute any damage which the plaintiff may have sustained to the negligence of the defendant. And this is the view that is taken by the courts. *King v. City of Cohoes*,¹² is a case in point. The facts were as follows: the plaintiff was driving a horse hitched to a sleigh; the horse took fright and ran down a city street; this street was thirty feet wide; the city had negligently allowed a pile of ashes to accumulate, extending eleven feet into the street; a loaded wagon was passing the heap of ashes, leaving a clear roadway of about twelve feet; in passing this wagon the plaintiff's horse ran so near a hydrant at the side of the street that the sleigh struck the hydrant and the plaintiff was thrown out and injured. A referee found that the city had been negligent in placing the hydrant at such a point in the street, and that the plaintiff's injury was caused by the city's negligent conduct in so placing the hydrant and in allowing the ashheap to remain where it was; but he did not

¹² 77 N. Y. 83.

find that the accident could not have happened had either the ashheap or the hydrant been out of the way.

In reviewing the referee's findings on appeal, the court held that he had erred in finding that the city was negligent as to the location of the hydrant, such location having been an entirely proper one. The question then was as to whether the city's negligence in maintaining the ashheap could be regarded as the proximate cause of the plaintiff's injury. The court held that, on the referee's findings, it could not be so regarded, since he had not found that the maintenance of the ashheap was a cause without which the plaintiff would not have been injured. Said the court:

"It will be observed that the referee found the defendant negligent, both as to the heap of ashes and the hydrant, and that such negligence contributed to the accident; and he finds against the defendant on account thereof. He based his judgment upon two defects in the street; and how much he was influenced in reaching his conclusion by either we cannot tell. He certainly erred in finding that the defendant was negligent as to the hydrant. . . . The liability of the city must, therefore, rest entirely upon the obstruction caused by the heap of ashes. If it carelessly permitted that to remain, obstructing to some extent the roadway, it would be responsible for any accidents caused by it, but only for such accidents as would not have occurred but for such obstruction. We cannot say, from the evidence or the findings of the referee, that the heap of ashes was the cause of the accident, without which it would not have happened."

Exception. We may fairly say that, as a rule, the defendant's negligence cannot be regarded as the proximate cause of any injury which would have occurred without the operation of such negligence; but to this rule at least one exception should be noted. Suppose that some third person has also been negligent toward the plaintiff and that the negligence of the defendant alone or of such third person alone would be adequate to produce the plaintiff's injury; suppose, for instance, that two passenger trains are approaching a railway crossing; that the circumstances are such that negligence on the part of either train crew will result in a

collision; but that, as a matter of fact, both crews are negligent, as a result of which a collision occurs in which the plaintiff, a passenger on one of the trains, is injured. Will either railroad company be able to escape on the plea that the plaintiff would have been injured by the negligence of the other crew even if its own crew had used due care? Obviously not, since if one company might make such a plea the other could make the same plea and the plaintiff would be left without remedy. But, where the defendant is the only person that has been guilty of negligence it is believed that the rule stated is without exception.

Not Enough That Defendant's Negligence Has Contributed Essential Element to Production of Plaintiff's Damage. Granted that it must appear in the ordinary case that defendant's negligence was a cause but for the operation of which plaintiff would not have been injured, does the fact that his negligence appears to have been such a cause establish its status as the proximate cause? Were legal cause a pure question of physical causation, the answer might well be in the affirmative, for it is impossible to say that any essential cause is more or less essential than any other essential cause. We cannot say that any one link of a chain is more essential than any other link. But, as has been repeatedly insisted in this article, legal cause is not so much a matter of causation as of responsibility, and the so-called "but-for" rule has been generally rejected as a conclusive test of proximate cause. The leading case upon the subject is *Gilman v. Noyes*,¹³ the celebrated "bear case". There it appeared that the defendant had negligently left the plaintiff's bars down, in consequence of which certain sheep which the plaintiff was pasturing escaped from his pasture. The evidence tended to show that they were destroyed by bears after their escape. The trial court adopted the "but-for" rule, telling the jury that if the sheep would not have been killed but for the defendant's act in leaving the bars down he was liable for their value. The appellate court held that this instruction

¹³ 57 N. H. 627.

was erroneous as unduly extending the limits of the defendant's liability, declaring that it ought to have been left to the jury to say whether or not the destruction of the sheep was a consequence reasonably to have been anticipated from the defendant's act in leaving the bars down. It is plain that the test approved by the court assumes physical causation and seeks only to fix the limits of responsibility for the actual consequences of the defendant's conduct.

§ 36. Usual Test—The "Natural and Probable Consequence" Rule. The test adopted by the court in the case last considered is the one most frequently adopted by modern courts. Its application is nowhere better illustrated or expounded than in the leading case of *Milwaukee Railway Co. v. Kellogg*.¹⁴ It appears that the defendant in that case had an elevator which was located on the west bank of the Mississippi. This elevator was built of pine and was one hundred and twenty feet high. Several hundred feet from the elevator the plaintiff had a sawmill and some piles of lumber. While attempting to land its steamboat at the elevator the defendant's servants negligently caused fire to escape from the steamboat to the elevator. The building caught fire, and a strong wind, which was blowing at the time, carried the fire to the plaintiff's mill and lumber, which it destroyed. The lower court refused to instruct the jury, as requested by the defendant, that the plaintiff's loss was too remote from the defendant's negligence to afford a ground of recovery and left it to the jury to determine whether the burning of the plaintiff's property was a consequence reasonably to have been anticipated from the defendant's negligence. The defendant excepted and the case was carried to the Supreme Court of the United States. That court upheld the trial court. Said Mr. Justice Strong:

"It is admitted that the rule is difficult of application. But, it is generally held, that, in order to warrant a finding

¹⁴ 94 U. S. 469.

that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible character of the sawmill and piles of lumber."

- *The Rule Justified.* It will be noted that the test of proximate cause as laid down in the case last considered is essentially the same test that is used in determining the existence of a duty of care: in solving each problem the test adopted is the foreseeable character of consequences. This is not an accident nor is it the result of confusing the two problems of negligence and legal cause; it is rather a logical recognition of their common meeting place. We have already seen that a duty of care is in strictness a duty to avoid acting in such a way as to cause foreseeable damage to another's person or property. We have also seen that a proximate consequence is nothing more nor less than a consequence for which the defendant is legally responsible. Now suppose that the defendant has so conducted himself as actually to avoid causing any foreseeable damage to the plaintiff: could we, after having thus defined the duty of care, consistently say that this duty has been violated in such a way as to give rise to a cause of action, even though the defendant's conduct may have caused the plaintiff damage that could not have been foreseen? It would seem not. Since the defendant cannot be regarded as liable for any damage which does not amount to a breach of duty, it necessarily follows that unforeseeable damage ought not to be regarded as the proximate consequence of a breach of the duty of care. In other words, the rule that only foreseeable damage is sufficient to complete a cause of action for negligence is correct on principle as well as supported by the weight of authority.

The Rule Qualified. It must not be supposed, however, that no damage actually sustained by the plaintiff as a

consequence of the defendant's negligence will be sufficient to complete a cause of action unless it could have been definitely and precisely foreseen. That would amount to denying recovery altogether in the great majority of cases, for it will seldom happen that the precise consequences of any act can be definitely foreseen. It seems to be necessary that damage of the same general character as that which is relied upon as the basis of the plaintiff's action must have been capable of being foreseen by a man of ordinary prudence as the probable result of the defendant's action. Thus, if the defendant, as a man of ordinary prudence, could have foreseen that his conduct might damage the plaintiff's property but could not have foreseen that it might injure the plaintiff's person, it would seem that the actual occurrence of an injury to the plaintiff's person as a result of such conduct could not complete the action. In such a case it seems impossible to say that the defendant was under a duty of care that comprehended the avoidance of such an injury. On the other hand, if the damage which has occurred is of the same general character as that which could have been anticipated, it seems fair to say that the defendant's duty comprehended the avoidance of the damage that the plaintiff has sustained. This seems to be the basis of the decision of *Hill v. Winsor*.¹⁵ In that case it appeared that the plaintiff was injured while working on the fender of a bridge. This fender consisted of piles. To facilitate his work the plaintiff had put in a brace about a foot long to keep two piles apart which had been driven in such a way that one inclined toward the other. Owing to the negligence of the defendant's servants a steam tug was driven violently against the fender. The jar caused the brace to fall out, in consequence of which the two piles came together, and the plaintiff was caught between them and injured. Held, that the defendant was liable even though the precise consequence could not have been foreseen. Said Colt, J., in delivering the opinion of the court:

¹⁵ 118 Mass. 251.

“It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it, in fact, resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.”

Contrasted with the Rule Applied in Damages. The natural and probable consequence rule has so often been adopted as a test of the existence of liability for negligence that it cannot be rejected as such without going counter to a large number of well-considered cases. We have also seen that it has reason as well as authority in its favor. It must not be supposed, however, that this rule may be relied upon when the problem is to establish the limits of recovery when a cause of action for negligence is once made out. Actionable negligence is a tort. Like other torts it takes the tort rule of damages. By that rule the defendant's liability to make compensation for the consequences of his tort extends not only to those consequences which as a reasonable man he ought to have foreseen but also to such consequences as have actually followed in natural, unbroken sequence from the completed tort, even though such consequences could not reasonably have been anticipated.

An illustration may serve to make the matter clearer. The defendant is driving on a city street; his careless manipulation of the reins causes his horse to run away. The horse runs against the plaintiff, who is lawfully upon the street and in the exercise of due care for his own safety. The plaintiff is knocked down and severely bruised. His cause of action is complete. The defendant owed a duty of care to all persons lawfully upon the street. The defendant violated this duty and in so doing exposed the plaintiff to danger. The damage sustained by the plaintiff was proximately caused by the defendant's negligence, for it is the sort of harm which the defendant ought to

have foreseen as being reasonably likely to occur as a result of his careless driving; in other words, it is the kind of harm which it was the defendant's duty to avoid.¹⁶ But this is not the whole story. It appears that the physical concussion and the shock to the plaintiff's nervous system started a chain of sequences which ultimately resulted in the bursting of a blood vessel in his brain, with consequent paralysis. Another question now arises. Granted that the plaintiff has an action which was complete at the moment he was struck down, may he recover for the paralysis as an item of damages? The law's answer is that he may do so if it was proximately caused by the defendant's tort. Here then is a problem of proximate cause in the field of damages. And the test here is not what the defendant ought to have anticipated but what actually followed in natural sequence. Under the former test the defendant might escape liability for the plaintiff's paralysis; under the latter test he must compensate the plaintiff for that item as well as for the pain and bruises which were immediately caused by the impact of the plaintiff's body against the ground.¹⁷

Sometimes indeed the "natural and probable consequence rule" is laid down as a rule of damages as well as a rule of torts; as a rule for ascertaining the extent as well as the existence of liability for negligence;¹⁸ but the better view is that the plaintiff is not thus restricted in his right to compensation.¹⁹ On the other hand, recognition of the limited application of the natural and probable consequence rule in the sphere of legal cause, should not lead, as it sometimes has done, to the conclusion that such a rule has no place in legal cause. It should be remembered that it is only by inquiring whether foreseeable damage has occurred that we may ascertain whether the defendant has caused the plaintiff damage as a breach of his duty of care.

¹⁶ See *McDonald v. Snelling*, 14 Allen 290.

¹⁷ See *Bishop v. St. Paul City Ry. Co.*, 98 Minn. 26.

¹⁸ See *Greenland v. Chaffin*, 5 Exchequer 248.

¹⁹ *Sedgwick's Elements of Damages*, 2d ed., p. 50.

INTERVENING CAUSES

§ 37. **In General.** It sometimes happens that the negligent act of the defendant directly causes damage to the plaintiff without the intervention of any other cause, so that the defendant's negligence is in a physical sense the immediate cause of the plaintiff's injury. In such a case the problem of legal cause assumes its simplest form and usually presents no great difficulty. When, for instance, it appears that the defendant has thrown a stone which struck the plaintiff in its flight, it is generally a simple matter to determine whether or not the defendant ought to have foreseen such a consequence at the time he threw the stone. More often, however, the plaintiff's injury is separated from the defendant's act by one or more intervening causes. Such a cause may be the operation of a blind natural force, like the wind or the tide; it may be the action of an animal, either wild or domestic; or it may be the act of a human being, whether the plaintiff himself or a third person. The intervention of such a cause obviously makes the problem less simple. If there are several such intervening causes, as in fact there often are, the problem becomes complex and often difficult. Generally speaking, we may say that the greater the time or distance and the more intervening causes there are between the defendant's negligence and the plaintiff's damage, the less likelihood there is of our being able to say that the defendant ought to have foreseen the plaintiff's damage as a consequence of his negligent conduct. Yet no one of these elements is necessarily decisive.

However great the time or distance may be and whatever the number of intervening causes, the "natural and probable consequence" rule may still be applied. Whenever it appears that the defendant as a man of ordinary prudence ought to have foreseen the operation of an intervening cause that would make his conduct more dangerous to the plaintiff, such a cause may fairly be regarded as a part of the circumstances of which he was bound to take notice at the time of his action and for the conse-

quences of which, as affected by his own conduct, he should be deemed responsible.

It must be admitted, however, that there are many cases which cannot be satisfactorily explained by the application of such a test. Sometimes a defendant is held when, under the "natural and probable consequence" rule, it would seem that he ought to escape; sometimes a defendant escapes when, under the application of the same rule, it would seem that he ought to be held. Sometimes indeed a court, confronted by the difficulty of determining what could or could not have been foreseen in the light of particular circumstances, deliberately rejects the rule as useless. At other times it is rejected as inapplicable when an intervening cause of a particular type appears. And yet it is believed that, subject to these limitations, responsibility for the operation of intervening causes depends ordinarily upon the test of foreseeableness. On principle it seems that no other test could well be applied in negligence causes. The various types of intervening causes will now be examined.

§ 38. Inanimate Forces. Two actual cases will illustrate the application of the test of foreseeableness to the intervention of inanimate natural forces. In *Poeppers v. Missouri Railway Co.*,²⁰ the plaintiff sought to recover for the loss of property alleged to have been caused by the defendant's negligence in allowing fire to escape from one of its engines. It appeared that some sparks set fire to dry grass near the defendant's track while a high wind was blowing. This was during the afternoon. The wind died down with the coming of night. At that time the fire had reached a point nearly three miles from the track. In the morning the wind rose again and blew hard, as was not unusual in that region, and carried the fire some five miles farther until it reached the plaintiff's farm, where it crossed a plowed fire line sixteen feet wide and did the damage for which recovery was sought. Held, that the plaintiff could recover. After adopting as its rule of decision what it characterized as the "doctrine generally

²⁰ 67 Mo. 715.

sanctioned, that proximate damages are such as would be reasonably anticipated by a prudent man", the court said:

"The fluctuations of the wind at the season of the year when this fire occurred is nothing remarkable or extraordinary, as the testimony in this case shows. The cessation of the wind at nightfall on the prairie is a matter of course, and the increase of the wind the next morning is a circumstance which might well have been anticipated. We do not regard this as an intervention of a new agent, relieving the wrongdoer of responsibility."

The court goes on to say that had the wind on the second day been "extraordinary, not to have been anticipated" it might have been considered as such an agent. In *Marvin v. Chicago Railway Co.*,²¹ we have a good illustration of a case falling on the other side of the line. There, too, the plaintiff claimed damages for the destruction of his property by fire as a result of the defendant's negligence; but it appeared that he would have sustained no loss had it not been for an extraordinary wind, a "whirlwind" as one witness called it, which carried a burning brand over a ridge to the plaintiff's cranberry marsh, the burning of which was the basis of the plaintiff's complaint. This was a clear case of an intervening natural force that could not have been anticipated. Applying the test of foreseeableness the court gave its decision for the defendant.

§ 39. Actions of Animals. Not infrequently the action of an animal appears as an intervening cause. Does the fact that an animal is possessed of volition necessitate the application of a different rule from that which is applied when we are dealing with inanimate forces? The courts seem to recognize no such necessity. It will be remembered that in *Gilman v. Noyes*,²² which was considered in a preceding section,²³ there intervened between the defendant's negligence in leaving down the plaintiff's bars and the plaintiff's loss by the destruction of his sheep both the action of the sheep in escaping through the opening and the action of the

²¹ 79 Wis. 140.

²² 57 N. H. 627.

²³ See *supra*, footnote 13.

bears in attacking the sheep, and that the court applied the "natural and probable consequence" rule as a test. Of course the action of the sheep, and of the bears as well, was just as natural and irresponsible as that of the wind or the tide. The leading case upon the acts of animals as intervening causes is *McDonald v. Snelling*.²⁴ There it appeared that the defendant had negligently caused a horse to run through the streets of Boston. In its course the animal ran against and seriously injured the plaintiff, who was lawfully upon the streets at the time. In holding that his injury was not too remote, the court said in part:

"It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequences. By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act."

On the other side of the line falls *Cox v. Burbridge*,²⁵ a case in which the plaintiff, a child of tender years, sought to recover for injuries resulting from his having been viciously kicked by the defendant's horse. There was some question as to whether the defendant had been guilty of any negligence in the management of his horse; but the court took the ground that even if it were admitted that he had been guilty of such negligence he would not be liable for the plaintiff's injury in the absence of notice that the horse was of a vicious disposition, since the defendant had no reason to suppose that his horse would do an act contrary to his ordinary na-

²⁴ 14 Allen 290.

²⁵ 13 C. B. N. S. 435.

ture. Said Erle, C. J.: "everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway."

§ 40. **Acts of the Plaintiff.** Sometimes it appears that the defendant's negligence would have had no effect upon the plaintiff had it not been for an intervening act of the plaintiff himself. Such an act may have been negligent with respect to the plaintiff's own safety, in which case recovery will ordinarily be denied upon principles that will be explained in the chapter on Contributory Negligence,²⁶ or the plaintiff's intervening act may have been in no respect culpable. Such nonculpable intervention may have been in no sense attributable to the defendant's fault, in which case the plaintiff's injury must be deemed a pure accident for which nobody is responsible; or it may have been directly caused by the defendant's negligent act, in which case the defendant will usually be held liable for the consequences of the plaintiff's intervention. Where the defendant's negligent act creates a situation that compels the plaintiff to choose between two alternatives for the purpose of avoiding danger it is only fair to hold the defendant responsible for the consequences of the plaintiff's choice provided only that the plaintiff acts as a man of ordinary prudence might act under the same circumstances. In such a case it matters not that the plaintiff might have escaped injury had he chosen the other alternative nor does it matter whether he acts with coolness or in a state of bewilderment. It is to be expected that one whose safety is imperiled will endeavor to save himself and it is not uncommon for prudent men to lose their presence of mind when suddenly confronted by a great danger.

The principle is well illustrated in *Chicago & Alton Ry. Co. v. Corson*,²⁷ a case arising under a statute allowing the administrator of a deceased person to recover damages for the death of his intestate when such death was caused by a wrongful act. The deceased, a young woman, had been killed while attempting to drive across the defendant's track in front of an approaching train. She had cautiously

²⁶ See *infra*, ch. IV.

²⁷ 101 Ill. App., 115; affirmed, 198 Ill. 98.

approached the track, but, owing to a growth of corn, willows and hedge, had been unable to see or hear the oncoming train. When her horse's head reached a point within fifteen feet of the track the train suddenly appeared close at hand and traveling at the rate of forty or fifty miles an hour. Losing her self-possession she tried to make the crossing and was killed in consequence. The defendant's negligence consisted in the failure of its engineer to blow the whistle or ring the bell or otherwise signal the approach of the train to the crossing. It was contended that the defendant could not properly be regarded as responsible for the act of the deceased in attempting to cross the track when the train was so close upon her, but the court held otherwise. We quote from the opinion of Wright, J.:

"If one is placed by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury is of no importance. Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person; and he must bear its consequences."

§ 41. Acts of Third Persons—Concurring and Intervening Acts Distinguished. It frequently happens that the act of a third person contributes an essential element to the production of the plaintiff's injury. If such an act is simultaneous with the defendant's act or, in other words, is with respect to the defendant's negligence, a concurring cause of the plaintiff's injury, its occurrence and operation will afford no excuse to the defendant. If it was non-culpable with respect to the plaintiff the defendant will be solely liable. If it, too, was negligent with respect to the plaintiff both the defendant and the third person will be liable. Neither can escape from the consequences of his own breach of duty toward the plaintiff by showing that another was at

the same time guilty of a similar breach of duty. For example, if a plaintiff is injured in a collision caused by the negligence of two drivers he may sue either or both at his pleasure.²⁸ When, on the other hand, the act of a third person occurs after the defendant's act is complete but before the plaintiff's injury occurs a very different problem is presented. We shall see that the defendant's responsibility in such a case depends largely upon whether or not such intervention could have been anticipated by the defendant as a prudent man, although many courts tend to exonerate the defendant when the intervening actor is himself responsible to the plaintiff for the consequences of his intervention.

Non-Culpable Act of Third Person. When the intervening act is one for which the third person cannot be held responsible the plaintiff must recover from the defendant, if at all, and there is no reason why he should not do so if the intervening act is of a character that ought to have been foreseen by the defendant. Such a case is *Griggs v. Fleckenstein*.²⁹ The defendant had negligently left his team of horses standing unhitched in a city street. They started to run away. A crowd of persons rushed into the street and hallooed and raised their hats in order to stop them. This caused the horses to swerve from their course and drove them across the street where they struck another team. The second team took fright, broke loose and ran across the street and there ran against a horse and sleigh belonging to the plaintiff, breaking the sleigh and injuring the horse so that he died a few days later. For the plaintiff's loss the defendant was held responsible. We have already seen that the intervening acts of the two teams of horses would not necessarily excuse the defendant; and the court treated the action of the crowd as belonging in the same category. With respect to the interference of the crowd the court said in part:

"The attempt to stop the team was not successful, but,

²⁸ *Matthews v. London St. Tramway Co.*, 60 L. T. R. N. S. 47.

²⁹ 14 Minn. 62.

as we have seen, may have swerved the horses from the direct course in which they were going and occasioned the collision with the team hitched at the side of the street. The attempt to stop the team in their course through the street was certainly proper and would ordinarily be expected. Under such circumstances there is nothing in the testimony which tends to show that there was anything wrongful, careless, or improper in the means resorted to by these persons to accomplish their purpose; they are, therefore, entirely innocent and free from blame. If they contributed to the injury in any degree, they were innocent agents in the matter, and as their interference in this manner was proper, and was such an interference as would be embraced in the ordinary results of such an occurrence as this runaway, it would in no wise excuse the defendant, or relieve him from the injury resulting from the runaway which occurred through his negligence."

Negligent Act of Third Person. When, however, the intervening act is of such a nature as to make the third person liable for the consequences of his interference, a new element is introduced into the problem. On principle it would seem that the natural and probable consequence rule should still hold. If, at the time of his negligence, the defendant ought to foresee that his conduct will probably become dangerous to the plaintiff by reason of the intervention of a third person it would seem that the probability of such intervention should be treated as one of the surrounding circumstances of which he is bound to take note and that too, whether the third person's conduct be actionable or not; for the mere fact that another is liable for the plaintiff's injury does not necessarily excuse the defendant from liability for the same injury, as we saw when considering the effect of concurring negligence.³⁰ In some cases these considerations have prevailed and the defendant has been held liable notwithstanding the intervening negligence of a third person. *Williams v. Kohler*,³¹ is an example. The defendant's servant had left a truck and team of horses standing in a city street, the team being untied and unattended. During his absence the horses started and after they had gone a few

³⁰ See *supra*.

³¹ 58 N. Y. S. 863.

yards a stranger stopped the team and drove them back to the place where the driver had left them. In so doing he drove the team against a pushcart, by which the plaintiff, a young boy, was standing. The pushcart, being overturned, threw the plaintiff against a coal box and injured him. The court held that the defendant was liable whether the stranger drove negligently or not. Said Cullen, J.:

“We think that one of the dangers to be fairly anticipated from leaving horses unattended in a city street is, that if they start to run off, the persons who attempt to stop them may be careless or ignorant of the management of horses, and thus jeopardize the safety of people on the highway.”

On the other hand, inasmuch as most persons are usually not negligent, it is seldom that the negligence of a third person is to be anticipated, and the courts show a distinct tendency to regard such intervention as something for which the defendant ought not to be deemed responsible.

An illustration of this tendency is seen in *Stone v. Boston & A. R. Co.*,³² in which the plaintiff sought to recover for damage caused by a fire that spread from the defendant's freight depot. The defendant had negligently allowed a large quantity of petroleum to remain upon a platform that was itself saturated with oils and under which was a mass of rubbish similarly saturated. A teamster brought a load of goods to the depot for shipment and, while standing near the platform, lighted a pipe and negligently threw the match into the rubbish under the platform. For the consequences of the fire which inevitably followed the court held that the railroad was not responsible since the negligence of the teamster must be regarded as the proximate cause. Indeed, some courts have gone so far as to lay it down as a general rule that the intervening negligence of a third person, without which the plaintiff's loss would not have occurred, severs the casual connection between the defendant's negligence and the plaintiff's injury.³³ But this seems

³² 171 Mass. 536.

³³ *N. Y. C. & St. L. R. Co. v. Perriguet*, 138 Ind. 414.

to be going altogether too far. There seems no good reason for denying recovery on account of intervening negligence where the defendant's own experience informs him that such intervention is actually likely to occur. An accurate statement of the result of the decisions in this class of cases is found in the opinion of Mr. Justice Holmes in *Clifford v. Atlantic Cotton Mills*,³⁴ from which we quote as follows:

"There is no doubt that a man may sometimes be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequently intervening misconduct of a third person. But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act."

Malicious Act of Third Person. Every argument that might be urged against allowing a recovery when the plaintiff's injury has been more immediately caused by the intervening negligent act of a third person may obviously be urged with equal force to the same effect when the more immediate cause is the intervening malicious act of a third person. And, since malicious acts are much less frequent than negligent acts, it is usually much more difficult to anticipate their occurrence. Consequently, there is generally a stronger case against allowing recovery when the intervention is malicious. Hence, it is often said that there can be no recovery against a defendant when there has intervened between his negligence and the plaintiff's injury the malicious act of a third person. Upon that ground a defendant was held not liable for his negligent failure to keep a watch on guard over the property of the plaintiff, as a result of which an incendiary was enabled to set fire to the property.³⁵ And in another case,³⁶ a plaintiff was denied recovery for the loss of his goods by a burglary which had been rendered easy of accomplishment through the negligence of the defendant in leaving open certain

³⁴ 146 Mass. 47.

³⁵ *State v. Ward*, 9 Heisk. 133.

³⁶ *Andrews v. Kinsel*, 40 S. E. (Ga.), 300.

windows that communicated with the plaintiff's storeroom. In the latter case the court said it was a

"well-recognized principle that where there has intervened between the defendant's negligent act and the injury an independent illegal act of a third person, producing the injury, and without which it would not have happened, the latter is properly held the proximate cause of the injury, and the defendant is excused."

Had it appeared that burglaries were common at that time in the neighborhood of the plaintiff's store, and had the court been willing to apply the test of foreseeableness, it is obvious that a different result might have been reached.

On principle it would seem impossible to justify a hard and fast rule of exclusion regardless of circumstances, and, in spite of general expressions to the contrary, it must be admitted that such a rule is not always followed. Ordinarily, a bailee for safe keeping is liable for his negligence when he carelessly allows a thief to escape with the plaintiff's property;³⁷ yet the thief is clearly an intervening agent. In a recent Texas case,³⁸ the question arose as to whether a railroad company was under all circumstances entitled to presume that there would be no unlawful interference with its tracks and switches and so not required to guard against such interference regardless of its actual probability. Had the court clung to the view that the malicious intervention of a third person necessarily relieves the defendant of responsibility, it must needs have answered the question in the affirmative; but the court did not hesitate to declare that where the circumstances were such as to render it probable that its tracks or switches might be tampered with, it became the duty of the company to guard against such interference, and that if one to whom this duty was owed should be injured through the company's failure to discharge this duty it could not excuse itself by showing that the more immediate cause of the injury was the malicious act of a third person. It is sub-

³⁷ Tracy v. Wood, 3 Mason 132.

³⁸ International R. Co. v. Johnson, 23 Tex. Civ. App. 160.

mitted that the case is sound on principle. Ordinarily, a defendant should not be deemed responsible for an injury that would not have resulted from his negligence without the negligent or malicious intervention of a third person, for the simple reason that ordinarily such intervention is improbable; but where circumstances apprise the defendant that such intervention is probable it is but just that he should be required to guard against it or be held responsible for his failure to do so.

CHAPTER IV

CONTRIBUTORY NEGLIGENCE

§ 42. **Nature of Contributory Negligence.** We have already seen that the fact that the negligence of a third person may, upon an application of the rules of legal cause, be found to be a proximate cause of an injury sustained by the plaintiff, does not preclude the negligence of the defendant from being regarded as another proximate cause of the same injury.¹ Similarly the fact that the defendant's negligence is found to be a proximate cause of the plaintiff's injury does not preclude the negligence of the plaintiff himself from being regarded as another such cause of his own injury. It may be said generally that a plaintiff is deemed guilty of contributory negligence whenever it appears that his own negligence is, along with that of the defendant, a proximate cause of the injury or damage of which he complains.² From this it necessarily follows that whenever the question arises as to whether the plaintiff's conduct amounts to contributory negligence in a given case two questions are really involved: first, we must determine whether or not the plaintiff has been negligent with respect to the safety of his person or property; then, if it be found that he has been, we must next decide whether or not his negligence may be regarded as a proximate cause of his injury or damage. In answering the first of these questions the same test is applied as when the question arises with reference to the defendant's conduct; the plaintiff is deemed to have been negligent toward himself if, as a man of ordinary prudence, he ought to have foreseen that his conduct might naturally result in actual damage to his person or property.³ In

¹ See *supra*, § 59.

² *Payne v. Chicago & Alton Ry. Co.*, 129 Mo. 405.

³ *Smithwick v. Hall*, 59 Conn. 261.

answering the second of these questions it might be supposed that the same tests are necessarily applied as when the inquiry is as to whether the defendant's conduct may be regarded as a proximate cause of the plaintiff's harm; but, unfortunately for the symmetry of the law, these tests cannot be safely relied upon. In the next section we shall consider the tests which are actually employed in solving the second question. In the remainder of this section it will be assumed that the plaintiff's negligence has been found to be a proximate cause of the damage upon which he relies as the basis of his action against the defendant and shall consider only the legal effect of such a relation between the plaintiff's negligence and the plaintiff's harm; in other words, we shall assume the existence of contributory negligence and consider only its legal effect.

§ 43. Effect at Common Law. The legal effect of contributory negligence, whether the action arise at common law, in admiralty, or under a statute, is limited to actions based upon negligence. It has nothing to do with intentional torts. If *A* knocks *B* down, it is, so far as *B*'s remedial rights are concerned, entirely immaterial whether he took care to avoid the blow or not.⁴ The effect of contributory negligence in a common-law action for negligence is completely to bar the plaintiff's recovery.⁵ In some jurisdictions, it is a part of the plaintiff's case to plead and prove his own exercise of due care and thus to negative contributory negligence;⁶ in others, contributory negligence is regarded as a defense to be pleaded and proved by the defendant;⁷ in still others, the procedure with regard to it is more or less anomalous; but, whether its negation be treated as a part of the plaintiff's case or its affirmation a part of the defendant's, the effect of contributory negligence upon the plaintiff's remedial rights is everywhere the same,—it absolutely bars recovery.

At one time a few jurisdictions were inclined to allow the plaintiff to recover in spite of his contributory negli-

⁴ *Steinmetz v. Kelly*, 72 Ind. 442.

⁶ *Park v. O'Brien*, 23 Conn. 339.

⁵ *Neal v. Gillett*, 23 Conn. 437.

⁷ *Magee v. R. R. Co.*, 78 Cal. 430.

gence whenever it appeared that his negligence was very slight in comparison with the defendant's;⁸ but this position has been generally abandoned.⁹ It may be laid down as a general rule that whenever the plaintiff's negligence has in the slightest degree operated as a proximate cause of his own injury his recovery is as completely barred as though his negligence had been the sole cause of his injury.¹⁰ Various reasons have been assigned for the severity of this rule; but it seems best supported upon considerations of expediency: on the one hand it has seemed unlikely that juries could apportion the responsibility with any degree of accuracy;¹¹ on the other it has seemed in accordance with public policy to make the personal interests of the parties dependent upon their own prudence and care.¹²

§ 44. Effect in Admiralty. Sometimes a plaintiff in an action for negligence must proceed in a court of admiralty and sometimes he has the option of proceeding either at common law or in admiralty. If he sues in an admiralty court his action cannot be defeated by showing that he has been guilty of contributory negligence. Questions as to the effect of contributory negligence in the maritime law have most frequently arisen with reference to collisions at sea. In England the rule is to estimate the total damage to the two vessels and divide it equally between them.¹³ In France and some of the continental countries the rule is to divide the loss proportionally to the faults of the two vessels.¹⁴ In this country it is settled law that contributory negligence is not a bar to the action and that the loss must be divided between the two vessels;¹⁵ but it seems not to be finally determined whether the loss should be divided equally or in accordance with their respective degrees of

⁸ *Galena R. Co. v. Jacobs*, 20 Ill. 496.

⁹ *City of Macon v. Holcomb*, 205 Ill. 643.

¹⁰ *La. Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

¹¹ *Neal v. Gillett*, 23 Conn. 437.

¹² *Bellefontaine & Ind. R. Co. v. Snyder*, 18 Oh. St. 408.

¹³ 13 Law Quarterly Review 17.

¹⁴ 13 Law Quarterly Review 17.

¹⁵ *The Max Morris*, 137 U. S. 1.

fault.¹⁶ The latter method certainly has substantial justice in its favor; and, since the facts are found by the court instead of a jury in an admiralty action, there seems to be no procedural difficulty in the way of its adoption.

§ 45. Effect under Modern Statutes. The effect of contributory negligence has not thus far been the subject of widespread legislation; but the severity of the common-law rule, which completely bars a plaintiff who has been contributorily negligent in even the slightest degree, has often resulted in serious hardship and it is, therefore, not surprising that statutes, intended to ameliorate the condition of industrial workingmen, have shown a distinct tendency either to abolish or to modify the common-law rule. Thus, in England, contributory negligence is not a defense in actions arising under the Workingmen's Compensation Act.¹⁷ In Wisconsin the doctrine of comparative negligence has been revived by a statute which provides that contributory negligence shall be no defense in an action for personal injuries brought by a railway employe against his employer when the negligence of the defendant has been greater and more effective in causing the plaintiff's injury than that of the plaintiff himself.¹⁸ On April 22, 1908, congress passed an act which provided that in actions for personal injuries brought by employes of railroads engaged in interstate commerce, contributory negligence should not bar recovery but should have the effect of diminishing the amount of damages to the extent of its influence in producing the injury.¹⁹ These statutes show the tendency of modern legislation. It is to be expected that their number will increase.

WHAT DETERMINES WHETHER PLAINTIFF'S NEGLIGENCE IS A PROXIMATE CAUSE OF HIS INJURY.

§ 46. Legal Cause. If legal cause were merely a problem of physical cause the same tests would necessarily be ap-

¹⁶ Compare: *The Victory*, 68 Fed. 395; *Jacobsen v. Nav. Co.*, 106 Fed. 428.

¹⁷ Note, *Ames' & Smith's Cases on Torts*, Vol. 2, p. 246.

¹⁸ *Wisconsin Laws of 1907*, p. 496.

¹⁹ *Act of Congress of April 22, 1908*, ch. 149.

plied in determining whether the plaintiff's negligence is a proximate cause of his injury as in determining whether the defendant's negligence is a proximate cause of the same injury. If *A* and *B* are both negligent with respect to a particular horse, and, as a result thereof, the horse is killed, the actual physical cause of the horse's death can in no way be affected by the ownership of the horse; obviously the actual causal relation between *A*'s negligence and the death of the horse must be precisely the same whether the horse be the property of *B*, of a third person, or of *A* himself. But we have already seen that legal cause is not so much a matter of physical cause as of responsibility for consequences and that in fixing such responsibility the law considers matters of policy and justice as well as mere causation.²⁰ Is it not possible that these considerations might, in the judgment of the courts, call for different answers according as the question of proximate cause arises with reference to the defendant's negligence or to that of the plaintiff? However that may be, the rules of legal cause that are applicable to the defendant's negligence cannot, as has already been said, be safely relied upon when the question is as to whether the plaintiff's negligence is such a proximate cause of his injury as to bar him from recovering on the ground of contributory negligence. They will be found to be decisive in most cases but not in all. This will appear from a study of the three types of cases in which the problem of contributory negligence is ordinarily presented. In the first the negligence of the defendant precedes that of the plaintiff; in the second the negligence of the defendant is concurrent with that of the plaintiff; in the third the negligence of the plaintiff precedes that of the defendant. These types will now be examined in turn.

§ 47. When Defendant's Negligence Precedes Plaintiff's. The defendant negligently places a long pole across a public highway. The plaintiff, without looking ahead to see whether the way is clear, rides his horse violently against

²⁰ See *supra*, § 31.

this obstruction, and, as a result, falls with his horse and is injured. Is the plaintiff's negligence a proximate cause of his injury? If we test the plaintiff's negligence by the same rules that we should apply to the defendant's, the question must be answered in the affirmative. The plaintiff ought to have foreseen that, if he did not look ahead, he might ride into an obstruction of some kind, and there was no intervening cause between his negligence and his injury. On the other hand, there is some question as to whether we could fairly regard the defendant's negligence as being in any degree proximately related to the plaintiff's damage. Under those rules it could not be so regarded unless there was special reason for the defendant to anticipate the negligence of the plaintiff which intervened between the defendant's negligence and the plaintiff's injury.²¹ Under the rules of legal cause which we have thus far considered the plaintiff's negligence must, therefore, be regarded as a proximate cause, if not the sole proximate cause, of his injury. In such a case, if ever, it would seem that the plaintiff's negligence should bar his recovery. That it does do so is entirely clear. When the defendant's negligence is antecedent to the plaintiff's the case is governed by the ordinary rules of legal cause and the plaintiff is, therefore, barred.²²

§ 48. When Defendant's Negligence Is Concurrent with Plaintiff's. Two highways intersect. *A* is driving on one of them and *B* is driving on the other. Each is driving toward the point of intersection. Neither is looking ahead. As a result of this concurring negligence of *A* and *B*, their teams collide and *A* is thrown from his conveyance and injured. Is *A*'s negligence a proximate cause of his injury? That it was a physical cause cannot be doubted. It is also plain that he ought, as a man of ordinary prudence, to have foreseen that such driving on his part might well result in such a catastrophe. Furthermore, since *B*'s negligence was simultaneous with *A*'s, it cannot be said that any cause intervened between *A*'s negligence and his injury. Accordingly, *A*'s negligence must be regarded as a proximate cause

²¹ See *supra*, § 41.

²² *Butterfield v. Forrester*, 11 East 60.

of his injury if the ordinary rules of legal cause are to prevail. Furthermore, it is clear that no consideration of policy or justice requires a different conclusion. *A*'s conduct was just as culpable as *B*'s. There is no more reason for allowing *A* to recover against *B* than there would have been for allowing *B* to recover against *A* in case *B*, and not *A*, had been injured. Here too, if ever, it would seem that the defense of contributory negligence must prevail. And such is the view of the law. We may say, generally, that whenever the negligence of the plaintiff is concurrent with that of the defendant the ordinary rules of legal cause prevail and the plaintiff's action at law will be barred if, as a man of ordinary prudence, he ought to have foreseen that his negligent conduct might naturally result in some such damage as that which he has actually sustained.²³

§ 49. When Plaintiff's Negligence Precedes Defendant's—The Doctrine of the "Last Clear Chance". In the leading case of *Davies v. Mann*,²⁴ the facts were briefly as follows: the plaintiff hobbled a donkey and negligently left it in a public highway; the defendant negligently drove a team of horses against the donkey, knocked it down, and killed it. The defendant argued that the plaintiff's negligence in exposing the animal to danger ought to prevent his recovery; but the court held that he could recover notwithstanding. It does not appear whether the defendant's negligence consisted primarily in failing to discover the donkey in time to avoid a collision or in careless driving after its presence was discovered. Indeed, it does not seem to have occurred to the court that this was at all material. The court seems to have regarded the defendant's negligence as the sole proximate cause just because it came last. This case is the parent of a long line of cases in which it is held that, notwithstanding the negligence of the plaintiff in exposing his person or property to danger, he may recover whenever the defendant's negligence intervenes between the plaintiff's negligence and damage. This is known as the doctrine of the "last clear chance". Many courts allow the plaintiff to

²³ *Gahagan v. Boston & Me. R. R.*, 70 N. H. 441.

²⁴ 10 M. & W. 546.

recover where the defendant's negligence consists primarily in failing to discover the danger that has resulted from the antecedent negligence of the plaintiff;²⁵ but many other courts allow a recovery under the doctrine of the "last clear chance" in those cases only in which it appears that the defendant knew of the danger created by the plaintiff's negligence.²⁶ The former of these views seems to involve the notion that proximity of cause necessarily depends upon a time relation, which we have, heretofore, seen is erroneous; the latter seems to be based upon the degree of the defendant's culpability, a consideration of policy and justice, rather than of causation.

That the doctrine of "the last clear chance" is not a specific application of the ordinary rules of legal cause, as often contended, but is in reality a special rule applicable to contributory negligence, is well brought out in a recent case,²⁷ in which one defendant sought to escape on the ground that another defendant had "the last clear chance" to avoid the plaintiff's injury. The plaintiff had been injured in a collision between two street cars, each operated by a different company. The motorman in charge of each car had been negligent. The plaintiff sued both companies. One of them contended that the negligence of its motorman could not be regarded as a proximate cause of the plaintiff's injury inasmuch as the motorman of the other company had the "last clear chance" to avoid it, and his negligence was, therefore, the sole cause. This contention was rejected by the court. Said Shaw, J.:

"Appellant seeks to apply the well-established principle that 'he who has the last clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so'. This rule is applicable only to cases where the defense is based upon the contributory negligence of plaintiff due to his want of care in placing himself in a position of danger, and where he may, notwith-

²⁵ *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728.

²⁶ *Green v. L. A. Term. Ry. Co.*, 143 Cal. 31.

²⁷ *Cordiner v. Traction Co. et al.*, 5 Cal. App. 480.

standing his negligence, recover from a defendant, who by the exercise of proper care could have avoided the injury."

This distinction must be taken for the sake of clearness. At the same time it should be noted that a plaintiff who recovers under the "last clear chance" rule would, in most cases, recover were the proximity of his negligence to his injury or damage tested by the same rules that are applied in testing the proximity of the defendant's negligence, for it will seldom happen that the circumstances are such as to enable a jury to say that the plaintiff ought to have foreseen the intervening negligence of the defendant, and in such case only could the plaintiff's negligence be deemed a proximate cause of his injury under those rules.²⁸

IMPUTED CONTRIBUTORY NEGLIGENCE

§ 50. Negligence by Representation. It is an elementary principle of the law that what a man may do in person he may ordinarily do by a representative. If, however, he undertakes to act by a representative he must assume full responsibility for all harm done by his representative while acting in his behalf. And this is true whether such harm is intentionally or negligently inflicted. Accordingly, as appears elsewhere in this work, the principal is liable for the negligence of his agent when the latter acts within the scope of his authority and the master is liable for the negligence of his servant when the latter acts within the course of his employment.²⁹ The same considerations which make a man liable as defendant for the negligence of his agent or servant ought to bar his recovery as plaintiff whenever it appears that the negligence of his agent or servant, while acting in his behalf, is, along with the negligence of the defendant, a proximate cause of his injury. And such is the law. A defendant may maintain the defense of contributory negligence by showing that the negligence of the plaintiff's agent or servant is a proximate cause of his injury as well as by showing that the negligence of the plaintiff himself is such

²⁸ See *supra*, § 41.

²⁹ See Article on Torts.

a cause.⁸⁰ It is, of course, assumed that the agent's negligence, to bar his principal's recovery, must have been committed while the agent was acting within the scope of his authority, and that the servant's negligence, to bar his master's recovery, must have been committed while the servant was acting within the course of his employment.

§ 51. Parent and Child. In some cases the principle of representation has been held to bar a recovery, although the plaintiff himself could not fairly be said to have chosen to act by a representative. Thus, some courts hold that an infant is barred by the contributory negligence of its parent or custodian. In one case upholding that view it is said:

"An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. . . . It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above the law . . . the defendant has a right to insist that he should not have been the heedless instrument of his own injury. . . . If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travelers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct."⁸¹

This reasoning, however, has not been generally approved; most courts that have dealt with the question have held that the contributory negligence of the parent or custodian cannot be imputed to the infant. Said one of them:

"The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by sub-

⁸⁰ *La Riviere v. Pemberton*, 46 Minn. 5.

⁸¹ *Hartfield v. Roper & Newell*, 21 Wend. 615.

stitution, for he is incapable of appointing an agent, the consequence being that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrongdoers to be answerable to a person who is incapable of either self-protection or of being a participant in their misfeasance.³²

However, the case in which the infant is plaintiff should be sharply distinguished from the case in which the father brings an action for the loss of the infant's services. If the loss occurred as a result of the combined negligence of the parent and the defendant, the parent is really seeking a recovery for damage which his own negligence has partly caused and is, therefore, barred by his own contributory negligence.³³ As to whether the father would be barred in a similar action by the contributory negligence of the child, there is considerable doubt.

§ 52. Other Instances. Similar questions arise with reference to the relation of husband and wife. The husband and a third person negligently injure the wife. The husband sues the third person for the loss of his wife's services. Of course he is barred by his own contributory negligence. Suppose, however, that he was free from fault but that his wife was negligent: will her negligence be imputed to him? The answer has usually been in the affirmative.³⁴ Indeed, it has generally been assumed that whenever the plaintiff derives his action from an injury to a third person he will be barred by the contributory negligence of the third person provided the third person himself would have been barred had he appeared as plaintiff.³⁵ Another relation which gives rise to questions of imputed contributory negligence is that of carrier and passenger. Is the passenger barred by the contributory negligence of the driver of an omnibus, of the captain of a ship, or of the conductor of a train? A few cases support the view that he is; but the great weight

³² *Newman v. Phillipsburg Horse Car Co.*, 52 N. J. Law 446.

³³ *Glassey v. Ry. Co.*, 57 Pa. St., 172.

³⁴ *C. B. & Q. R. R. v. Honey*, 63 Fed. 39.

³⁵ *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371.

of authority in this country as well as in England is to the contrary.³⁶ Of course if the passenger is aware of the danger and fails to act with ordinary prudence under the circumstances he may be barred by his own contributory negligence; but he will not be barred on the ground that the contributory negligence of the carrier is imputable to him.³⁷

³⁶ *The Bernina*, Law Rep., 12 Probate Div. 58.

³⁷ *Fechley v. Springfield Traction Co.*, 119 Mo. App. 358.

NEGLIGENCE

Read Carefully: Place your name and full address at the head of the paper. Any cheap, light paper like the sample previously sent you may be used.

6. Define *actionable negligence* and give its elements.
7. What is meant by "duty of care" and toward whom must such a duty exist to create a liability?
8. Distinguish between an act of omission which is attainable and one which is not.
9. What degree of injury must be shown before evidence of mere nervous shock and resulting illness may be admitted?
10. Can a single act or omission give rise to either an action for tort or breach of contract? Illustrate.
11. What is the standard of care required of normal adults? Of insane persons? Of children?
12. What reasons can you give for and against recognizing degrees of care and negligence in torts?
13. Why does the rule of ordinary care make the truest measure in the majority of cases?
14. Give two cases in which the extent of a defendant's failure to exercise due care is of legal importance.

NEGLIGENCE

15. State the rule of law established by the case of Winterbottom v. Wright.

16. How has the above rule been modified?

17. Is a landowner ever liable in tort to a trespasser because of the unsafe condition of his premises?

18. If the landowner leaves an article of machinery upon his premises that would attract a child to its injury, is he liable?

19. How does the fact that the presence of the trespasser is known affect the duty of care upon the owner?

20. Is there any duty upon a landowner to keep a lookout for trespassers?

21. In what respect does a licensee differ from a trespasser and how does the owner's duty differ towards the two classes as regards the passive condition of the premises? May he change the condition of premises after giving a license?

22. If a licensor does not know of a licensee's presence and an injury results, is he liable?

23. What duty of care is due from the invitor to the invitee who comes on business? To an invitee who comes as a social guest?

24. *A* is walking along a sidewalk adjacent to *B*'s land at night and losing his way falls into a pit on *B*'s land. Is *B* liable to *A* for the injuries resulting from the fall?

25. What is meant by Legal Cause in the law of Torts. In the law of Damages?

26. Define *proximate cause*.

27. What is meant by the statement, "defendant is not liable for remote consequences"?

28. Is the question of proximateness or remoteness a question for the court or jury, and how have different courts decided the matter? Which would you say was the better rule?

29. The defendant's negligence is found to be the cause, without which or but for which the injury would not have occurred. Does this alone make his negligence the proximate cause of the injury?

30. State the case of Milwaukee Railway Co. v. Kellogg, the rule laid down therein and its qualification.

31. An actionable tort having once been established, by what rule is the extent of the damages to be determined?

NEGLIGENCE

32. Does the natural and probable consequence rule apply in cases where there are intervening causes?

33. Give some cases illustrating the rule where their intervening cause is animate and where it is inanimate.

34. Will the intervening of the plaintiff himself relieve the defendant from liability for his negligence?

35. What kind of intervening acts of third persons are held sufficient to break the casual connection between the defendant's negligence and the plaintiff's injury? What acts will not break it?

36. How do you determine whether or not a plaintiff has been contributorily negligent?

37. In an action at common law for negligence what is the legal effect of proving contributory negligence?

38. How do the courts of admiralty apply the rule of contributory negligence?

39. How have modern statutes affected the rule?

40. By what rule do you determine whether the plaintiff's negligence is the proximate cause of the injury and when is the rule applicable?

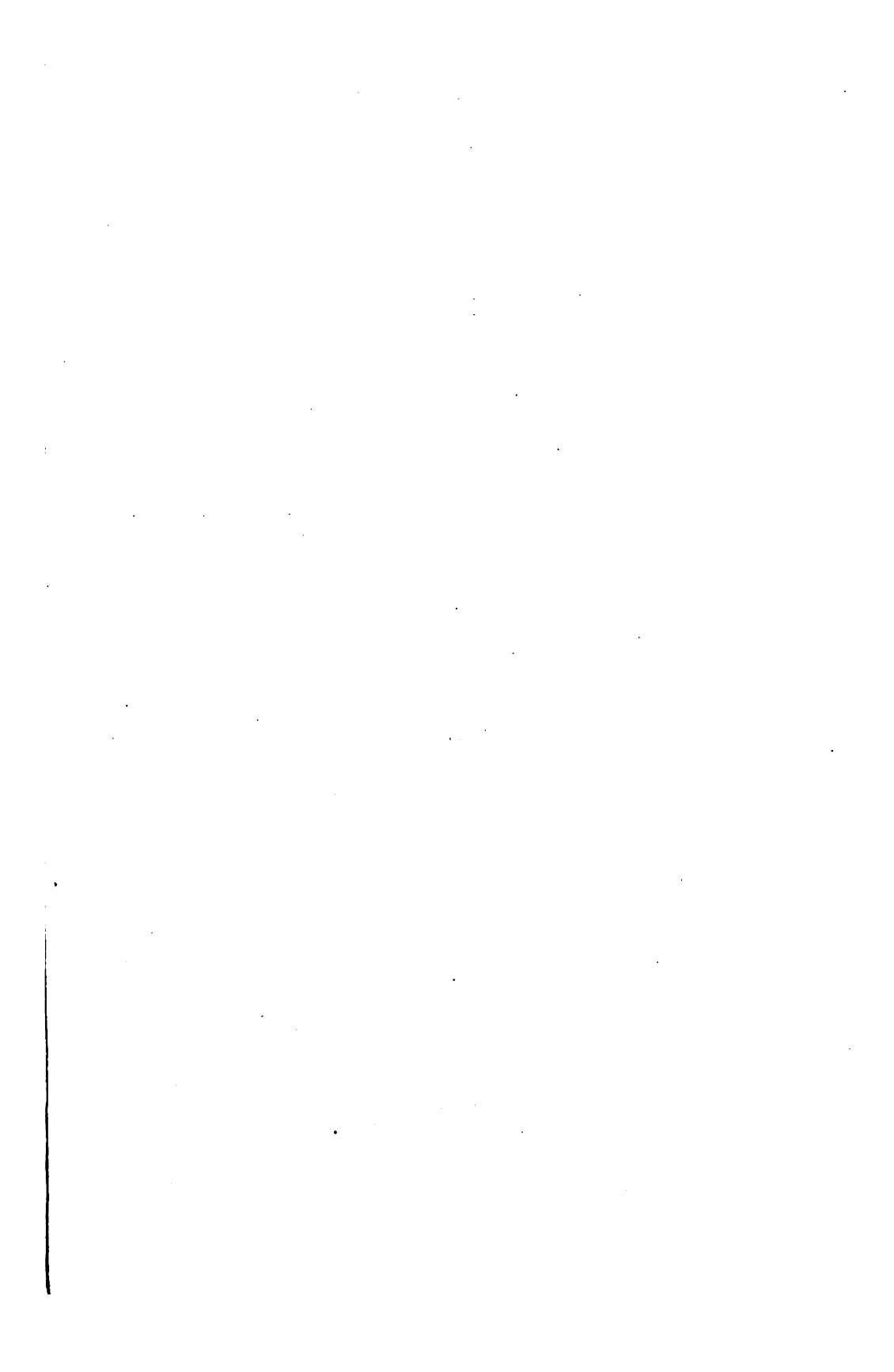
41. Define the doctrine of "Last Clear Chance" and give the two views taken by different courts of this doctrine.

42. Will the contributory negligence of an agent bar a recovery by his principal for an injury?

43. What is meant by imputed negligence and when will such negligence arise?

After completing the work, add and sign the following statement:
I hereby certify that the above work is entirely my own.

(Signed)



1

2

3

4

5

6

Stanford Law Library



3 6105 063 633 395

